Supreme Court, U.S.
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No. 95-824

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In The

Supreme Court of the United States

October Term, 1995

Dianna Dair Meyer,

Petitioner,

vs.

Shearson Lehman Brothers, Inc.

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeal Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Dianna Dair Meyer
Pro Se
125 Primrose Drive
Longwood, FL 32779
(407) 788-1698

49 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erroneously affirmed a District Court's ORDER to Compel Arbitration based on a hearing where 20th century technology, or lack thereof, was permitted to undermine judicial process resulting in an ex parte hearing and denying Plaintiff her constitutional right to due process as guaranteed by the Fifth Amendment to the Constitution of the United States of America.

2. Whether the Eleventh Circuit erroneously affirmed District Court's ORDER to Compel Arbitration in conflict with the decision of another United States Court of Appeal on the matter of voluntary vs. involuntary or mandatory arbitration argued in ***Prudential Ins. Co v. Lai*** 42 F.3d 1299 (9th Cir. 1994) and recently let stand by this Court docket 94-1923 October 3, 1995.

3. Whether this Court's opinion in ***Gilmer v. Interstate*** 114 L.Ed 2d 26 (1991) and justified at 1655 "by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration" is being enforced in the judicious spirit that this Court granted precedent.

4. If the deferred Motion to Vacate at the District Court is vacated, based on Federal Arbitration Act 9 U.S.C.Section 10 and the alleged fraudulent evidence presented by Respondents during the arbitration, conforms to the three part test used to identify fraud by ***Bonar v. Dean Witter Reynolds, Inc.,*** 835 F.2d 698 (11th Cir. 1988), will this sexual harassment, sexual discrimination, age discrimination, retaliation and constructive discharge civil rights case be sent back to arbitration or will it be sent to trial with a judge and jury.

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II. This Court's recent decision to let stand a 9th Circuit Court decision where Securities industry employees may only be forced to forgo statutory remedies and arbitrate claims if one knowingly agreed to submit such disputes to arbitration.

III. The decision and opinion of this Court in ***Gilmer v. Interstate/Johnson Lane Corp.***, 111 S.Ct. 1647 (1991) falls short of providing a fair and equitable resolution for civil rights cases through the use of arbitration.

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PETITION FOR A WRIT OF CERTIORARI

Dianna Dair Meyer respectfully petitions for a writ of certiorari to review the judgment of the Eleventh District Court of Appeal.

OPINIONS BELOW

The opinion of the U.S. District Court is not yet reported but is included as Appendix B and C. The opinion of the Eleventh Circuit Court of Appeal (Appendix A) is unreported.

STATEMENT OF JURISDICTION

The District Court entered its judgment on November 4, and November 6, 1994. The Eleventh Circuit affirmed the District Court's Orders on August 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person ...shall be deprived of life, liberty, or property, without due process of law.

CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEAL

The decision of the 9th Circuit Court of Appeal in ***Prudential Ins. Co v. Lai,*** 42 F.3d 1299, cert denied 10/3/95 SC 94-1923 which argues:

> "a Title VII plaintiff may only be forced to forgo statutory remedies and arbitrate claims if she has "knowingly" agreed to submit such disputes to arbitration."

STATEMENT OF THE CASE

This petition raises fundamental questions concerning the abuse of process by officers of the court in undermining and creating fraud on the court with the intent of forcing Petitioner, Dianna Dair Meyer, into arbitration on a matter of civil rights based on 29 U.S.C. 621 et seq (Age Discrimination in Employment Act) and 42 U.S.C. 2000 e et seq (Title VII of the Civil Rights Act) without the opportunity and ability to present

her case at a hearing to address Respondent's Motion to Compel Arbitration. Constructive fraud [1]/ were the events that led to the hearing on April 22, 1992 and the resultant fraud on the court [2] / that created the ex parte hearing. The hearing had been prearranged between the court and the attorney's of record to be a telephone conference, and the hearing was exclusively accessed by the Judge Magistrate, the attorney for one of four original Plaintiffs in this case, and the attorney for Respondent, Shearson.

Two other plaintiffs, namely, Petitioner Dianna Dair Meyer and Herman K. Golnik, Jr., while physically present at the hearing, were excluded from listening to the conversations, from responding to the arguments, or from any manner of two way dialogue or meaningful communication, because the court was unable, and did not, provide a telephone link to include them. It was an ex parte hearing, which is a violation of the 3rd Canon of Judicial Conduct. A clear error of judgment by the Judge Magistrate, who could have and should have stayed the proceedings. It was an unfair hearing, because there was an absence of one or more elements essential to due process.

A. Elements of Due Process that were lacking included notice of hearing which arrived three business days prior to the hearing, lack of legal counsel and an ex parte hearing.

The hearing took place on April 22, 1992 before Judge Magistrate Baker in the courtroom of the United States District Court Middle District of Florida in Orlando. The only events

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1 and 2 Black's Law Dictionary page 661-Sixth Edition 1990.

1. Constructive fraud consists in any act of commission or omission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another.

2. Fraud on court is a scheme to interfere with judicial machinery performing task of impartial adjudication, as by preventing opposing party from fairly presenting his case or defense.

preceding the hearing that Petitioner Meyer was aware of included the following:

1. April 8, 1995 Nancy Donnellan (Donnellan), counsel of record at that time for Petitioner Meyer, informed Meyer that she was returning Meyer's case files and records and was also including a Stipulation to Withdraw by Donnellan as counsel of record for Meyer.

2. Meyer signed the Stipulation to Withdraw on April 13, 1992.

3. Donnellan called Meyer on April 15, 1992 wanting to know if the Stipulation to Withdraw had been signed and returned to her, and telling Meyer that there were more papers in the mail to her. The content of the package was not divulged.

4. On Friday, April 17, 1992, Meyer picked up at the local Post Office the "package of papers" that Donnellan had sent to Meyer. Included was an Order and Notice of Hearing for April 22, 1992 and a Motion to Compel Arbitration. These documents were docketed April 7 and 9, 1992 and Petitioner Meyer had no prior knowledge of their existence.

Late Friday afternoon, April 17, 1992, it was impossible to locate an attorney scheduling weekend appointments. On Monday Meyer attempted to locate an attorney who would be able to assist her. Unable to reach attorney, Jim Leone, whom she had contacted in 1991, she felt she would be held in contempt of court if she did not make an attempt to attend the hearing.

Meyer attended per the Order and was immediately confronted with the logistics problem of not having a phone line made available to her. The ex parte hearing lasted ten minutes and Meyer understood from the Judge that she was being compelled to mandatory arbitration. Nothing was forthcoming from Judge Baker or the Court until February 24, 1993 when Meyer received

Report and Recommendations and possible dismissal of her case.

In ***Powell v. Alabama***, 287 U.S. 45, 69 53 S.Ct. 55, 77 L.Ed. 158 (1932) at 170 states:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic element of the constitutional requirement of due process of law... the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

Also in ***Potashnick v. Port City Const. Co.***, 609 F.2d 1101, cert denied, 449 U.S. 820 (1980) at 1117 states:

> "The Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process....The right develops out of the principle that notice and hearing are preliminary steps essential to the passing of an enforceable judgment and that they constitute basic elements of the constitutional requirement of due process of law."

The three day period of time, that Petitioner Meyer was given to prepare, is the basis of an unfair hearing and a denial of due process. In ***Williams, Jr. v. Estelle*** 566 F. Supp. 1376 (1983) an attorney was given two and one half days to prepare for trial by a Magistrate. At 1379 it states:

> "While the Magistrate has a duty to expedite the disposition of cases and normally would be commended for doing so, the circumstances here raise a

> question as to how plaintiff's counsel could have been ready to proceed."
>
> "...his decision to force the case to trial under these circumstances, are such as to cause prejudicial error to the plaintiff's cause."

If a new trial is granted as in ***Williams v. Estelle*** in part because an attorney has only two and one half days to prepare for the hearing, it is clearly justified that a layperson with three days notice would be equally or more entitled to similar consideration. Meyer, as a layperson, had no knowledge of the legal system or processes involved. Meyer did not know the rules of the Court, and was at the total mercy of judicial and legal propriety. She, as most non-legal oriented people in such a situation, was in fear and trepidation of the unknown, which in this instance was the judicial and legal process itself. In ***Powell v. Alabama,*** 287 U.S. 45, 69 53 S.Ct. 55, 77 L.Ed. 158 (1932) at 170 states:

> "What, then, does a hearing include?...It has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

In ***Geders v. United States,*** 425 U.S. 80, 96 S.Ct. 1330 (1976) at 1335 it further confirms:

> Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

In ***Williams v. Estelle*** it was stated that " a crucial fact in this regard is that plaintiff did not move for a continuance" (one

must note that in ***Williams v. Estelle*** Plaintiff was represented by legal counsel). In the case before this Court, Meyer had no legal counsel and asking for a continuance was not a part of her vocabulary. Is it logical or fair to expect a layperson to respond t a Motion to Compel Arbitration with but three days notice? Is it logical or fair to expect a layperson to retain legal counsel with bu three days notice? Is it logical or fair to expect a layperson, or anyone for that matter, to attend a hearing out of fear of being held in contempt of court only to preside ex parte? As a layperso is this representative of normal judicial proceedings? If it is not. then three elements of due process were missing on April 22, 199. and a departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's supervisory power.

B. One may invoke the "plain error rule" in which legal impropriety has affected substantial rights, sufficiently grievous to justify notice by reviewing court and to convince it that, of itself, error possessed clear capacity to bring about unjust result.

If this were a simple matter of legal impropriety that would be one thing. Unfortunately, the events leading up to the hearing were far more than mere impropriety, or as Shearson would have you believe "complaint's are properly directed, if anywhere, at the conduct of her [Meyer's] former attorney." Shearson directed their comments away from the real issue of due process based on an absence of three specific elements (identified in A) and argued a case where a defendant, as in ***Irvin L. Young Foundation, Inc. v. Damrell,*** 607 F. Supp. 705 (D. Me. 1985), claimed that he was denied due process because he was not advised of the judicial proceedings which resulted in a default being entered against him. ***Id.*** at 708. The crux of the defendant argument was that the decedents counsel failed to protect his interests and did not keep him apprised of the progress of the suit ***Id***. The court held that while the decedent may have a cause of action against his attorney, there was no violation of the decedent

due process rights.

In the matter of Meyer's former attorney Meyer is aware that, absent responsibility and accountability, the correct avenue would be some form of sanctions applied to her via a complaint to the Florida Bar Association, but that was not Meyer's contention. What Meyer referred to, in an unschooled and unsophisticated search for the truth and justice, was the complicity which existed between Meyer's former attorney and the attorney for Shearson, which in this case led to an ex parte hearing. For Shearson's counsel to distance himself from the activities that preceded the April 22, 1992 hearing, and deposit it fully into the lap of Meyer's former counsel, is not representative of the facts presented.

Shearson's comment to the Eleventh Circuit in their reply brief "even if Ms. Meyer was denied due process, that was harmless error". To be harmless as it related to Meyer is a gross understatement. The only party to the hearing on April 22, 1992 with any potential for gain was Shearson. Their Motion to Compel Arbitration was the purpose of the hearing They have a long-standing tradition of seeking mandatory arbitration; see also ***McMahon v. Shearson,*** 107 S.Ct. 2332 (1987) setting precedent for mandatory arbitration of client claims; ***Mago v. Shearson*** 956 F.2d 932 (9th Cir 1992) setting precedent for arbitration in sex discrimination cases, ***Mastrobuono v. Shearson Lehman Hutton,*** 20 F.3d 713 (7th Cir. 1994) S.Ct.reversed No 94-18 argued January 10, 1995 - decided March 6, 1995 and seeking to apply New York punitive damage laws to arbitration.

If the purpose of the hearing was to compel arbitration, it is illogical to believe that counsel for Shearson would take it so lightly as to not even appear in person, unless they already knew they had control of the course of events, and use of the phone was nothing more than a final part of the scheme to undermine judicial process. It may have been harmless to Shearson, but it was not harmless to Meyer, it was not harmless to the professional reputation of Judge Magistrate Baker and it was not harmless to

integrity of the United States District Court Middle Division Florida in Orlando.

The issue was responsibility and accountability and whether the ex parte hearing was an element of due process. The Court and the judgment of the Judge Magistrate presiding, in this instance the United States District Court Middle Division Florida in Orlando, had the responsibility to conduct a fair and impartial hearing. Accountability must remain with the District Court, not with Meyer's former counsel. Understanding how it occurred, serves to address any impropriety with the methods used to manipulate the technological tools that the Court has available for its use.

Because the hearing was unfair, Petitioner Meyer is also invoking the plain error rule. In ***Williams v. Estelle***

> "considering whether an error was harmless, the Court necessarily must look to the circumstances of a particular case...The "plain error"rule should be invoked only in exceptional cases where it appears that the invocation of the rule is necessary in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process."

The acts leading up to the hearing were "willful". In ***Nees v. Securities and Exchange Commission,*** 414 F.2d 211 (1969) the term willful "means only that the act was a conscious, intentional action." To attempt to place the sequence of events on one person is a flawed argument. It took both counsel of record to discredit the integrity and reputation of the judicial process.

1. To say that Shearson did not know their attorney signed his name and initialed the name of Meyer's former attorney on a Joint Motion and Memorandum in Support to Schedule a Status Conference is untrue. It is on the docket 4/7/92.

2. To say that Meyer's former counsel did not know what she was doing when she Federal Expressed a letter, Stipulation to Withdraw and assorted files and records to Meyer at her place of employment is illogical. The cover letter is dated April 8, 1992 and is included on the record as Vol. 3, Doc. 70, Attachment B, Page B-23.

3. To say that Shearson did not know what they were doing when their attorney signed his name and initialed the name of Meyer's former counsel on the Motion to Compel Arbitration and the Memorandum in Support of Motion to Compel Arbitration and submitted it to the District Court is illogical. It is on the docket 4/9/92.

4. To say that Meyer's former counsel did not know what she was doing when she drafted and sent the Memorandum in Support of Nancy K. Donnellan for Leave to Withdraw is untrue. It is on the docket 4/10/92.

5. To say that Order and Notice of Hearing was granted 4/10/92 and Counsel of Record did not know is illogical. It is on the docket 4/10/92 and mailed to counsel of record.

6. To say that Meyer had the same amount of advance notification of the hearing and of the Motion to Compel Arbitration as Counsel of Record and the Court is totally false. The Certified cover letter sent by Donnellan to Meyer shows a date of 4/14/92 and is signed by Meyer's former counsel. Meyer received it on 4/17/92. (Vol. 3, Doc. 70 Attachment A, page A-1)

7. To say that neither Meyer's former counsel or Shearson's counsel were involved in a request to the Court to have a phone conference is illogical. They were both tied into the Court for the conference held April 22, 1992.

8. To say that Meyer lost the right to address the entire matter of the hearing "due to a waiver by Ms. Meyer caused by

her failure to object to the underlying Magistrate recommendation" is unjust. Counsel for Meyer was not deleted as Counsel of Record until 4/30/92 (it is on the docket). Meyer (and Golnik in his sworn affidavit) were never sent, and never received, the Report and Recommendation dated April 23, 1992 stating that "objections to R and R due by 5/7/92." Meyer never waived her right to object. She was never notified.

To be held accountable without proper notice, without legal counsel, and following an ex parte hearing without notice of the right to object, includes an abundance of events to invoke "plain error rule" in which legal impropriety has affected substantial rights. If this is standard judicial procedure then it is unfair.

> The principle of fundamental fairness is not strictly limited to those situations in which a party has suffered arguable prejudice. The principle is designed to maintain also public confidence in the administration of justice. ***United States v. Taylor,*** 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866, 102 S.Ct. 329, 70 L.Ed.2d 168 (1981)

C. A court trial schedule had been established by the District Court and Petitioner was unaware of any precedent that would have precluded this case from going forward per the schedule with a jury trial.

This case was originally filed as a COMPLAINT alleging discrimination in employment with demand for a jury trial on the docket 3/20/91. A scheduling order was set on 6/12/91 and shows on the docket as follows:

Discovery cutoff	2/1/92
Filing of all Motions	3/1/92
Pretrial Statement	4/1/92
Jury trial	7/6/92

On 4/3/92 the Court sent an ORDER (parties are to show cause

why there was a failure to comply with the Court's Order) to counsel of record, which clearly resulted in the blizzard of activity that led to Petitioners loss of her right to due process as described in Section A and B. Shearson's quantum leap from "law on the books" to "even if Ms. Meyer was denied due process, that was harmless error since this case would have been compelled to arbitration anyway" was incorrect then, and is so now.

Petitioner was denied due process, a constitutional right. Shearson engineered fraud on the court at the District Court of Appeal level. As a result, this case was removed from a jury trial scheduled for 7/6/92 and sent to arbitration almost two years later in March, 1994. The intent by which the Eleventh Circuit has taken in recognizing the federal policy favoring arbitration, "to relieve congestion in the courts and provide parties with a less expensive and speedier means of dispute resolution." ***Robbins v. Day,*** 954 F.2d 679, 682 (11th Cir. 1992) fails in its basic premise.

Removing this case to arbitration failed to achieve a "speedier means of dispute resolution" and served to extend an already prolonged series of legal actions (since May, 1989). Is it less expensive? The cost and expenses of legal actions are directly related to the length of time spent in achieving an end result. Being moved to arbitration required a totally new set of standards and criteria to be learned in order to be prepared to present ones case. New rules and new regulations require an additional amount of time and research. Instead of being less costly, it substantially increased Petitioner's costs and expenses. The burden thus placed upon the individual plaintiff in this case by this judicial process was to effectively remove any semblance of a level playing field and negatively exacerbate the very points upon which arbitration has been justified. Corporations exist in perpetuity, individuals do not. Delays do nothing but provide leverage for corporations.

The argument that was presented by Petitioner to the Eleventh Circuit, and never addressed by Shearson, revolved around the issue of retroactivity. Petitioner signed a U-4, the

document that the security industry uses to claim contractual obligation to mandatory arbitration. When Meyer signed the U-4 in 1987 , mandatory arbitration as it related to employee contracts, in the security industry was still being challenged. It was challenged in 1988, in 1989, in 1990 and up through May, 1991 until ***Gilmer v. Interstate/Johnson Lane Corp.***, 111 S.Ct. 1647 (1991). ***Gilmer*** established precedent for ADEA claims and ***Mago v. Shearson,*** 956 F.2d 932 (9th Cir 1992), established mandatory arbitration for sex discrimination cases.

Petitioner Meyer already had filed her complaint and had a court date before ***Gilmer*** was established as precedent. It is confusing and disruptive to those already with trial dates to begin an entirely new and revised course of activity. It seems, given the opportunity, this could have and should have been argued on a case by case basis, and there is no guarantee that it would have gone to arbitration. In ***Luddington v. Indiana Bell Telephone Co.***, 966 F.2d 225 (7th Cir. 1992) the Seventh Circuit broadened its stance on retroactivity of the 1991 Civil Rights Act holding that it could not be applied to conduct occurring before the effective dates of the statute or cases brought before the various provisions took effect. There is nothing in ***Gilmer*** that addresses retroactivity.

When this Court rendered its opinion and dissent in ***Gilmer v. Interstate/Johnson Lane Corp.***, 111 S. Ct. 1647 (1991) one of the areas or allegations was " unequal bargaining power between employers and employees". It was the decision of this Court at 1656 that

> "arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Section 2. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Mitsubishi,

> 473 U.S., at 627, 105 S.Ct., at 3354...this claim of unequal bargaining power is best left for resolution in specific cases."

The U-4 which was signed by Petitioner and is Exhibit C of the Memorandum in Support of Motion to Compel Arbitration by Respondent was signed on October 5, 1987, the day Meyer was informed that she could return to her job, five weeks after she had been terminated without cause from her position with Shearson under a nationally sponsored Shearson Lehman Brothers Financial Consultant Trainee Program Contract. Her original contract had already been broken by Shearson on September 9, 1987 when she was fired without reason.

"To succeed on claim of duress, party must show that it was illegally compelled or coerced to act by fear of serious injury to his person, reputation, or fortune." ***Enzymes of America, Inc. v. Deloitte, Haskins & Sells,*** 523 N.W. 2d 810, 207 Mich.App. 28. Signing the U-4 on October 5, 1987 was done so under the most stressful of circumstances. "Key element in duress is state of mind of person threatened, but this is not to say that existence of choice necessarily disproves existence of duress. ***Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*** 372 F.2d 753 (1967) at 757. Had Meyer been permitted to present her case at the hearing on April 22, 1992, she could have identified the duress that she experienced the day she signed her U-4. Instead, Petitioner was denied due process and a fair hearing.

D. Recent positions about mandatory arbitration have indicated judicial review and reassessment.

The ***Prudential Ins. Co v. Lai,*** 42 F.3d 1299 (9th Cir. 1994) cert. denied 10/3/95 case addresses the fact that the signing of the U-4 "may only be forced to forgo statutory remedies and arbitrate claims if she has "knowingly" agreed to submit such disputes to arbitration." There is nothing in this case that would indicate that Petitioner would have chosen arbitration had she been

provided with that as an alternative. To the contrary, since the hearing on April 22, 1992, all attempts and efforts to dispose of this matter in the secrecy and anonymity of arbitration have been forced upon Petitioner. Her rights have been violated by the very judicial and legal process that are supposed to protect her.

This Court by denying cert in the ***Prudential*** matter has indicated its concern for the process that denies a registered representative, financial consultant, account executive their statutory rights without voluntarily or knowingly consenting. At the Eleventh Circuit we addressed this case and quoted from ***Prudential***, Senator Robert Dole's statement in the Cong. Rec. S 15472, S. 15478 (Daily Ed. October 30, 1991) when discussing the Civil Rights Act of 1991 that the arbitration provision encourages arbitration only "where the parties knowingly and voluntarily elect to use these methods." Section 216 of the 1991 Civil Rights Act emphasized that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, th remedies provided by Title VII.

"This Court without overruling ***Alexander v. Gardner Denver,*** 415 U.S. 36 (1974) held that individuals may contractually agree to arbitrate employment disputes and thereby waive statutory rights to which they would otherwise be entitled." ***Gilmer v. Interstate/Johnson Lane Corp.***, 580 U.S. 20 (1991). Arbitration has been forced in this instant case, when it would appear that this Court intended it to be a voluntary, alternative forum.

The issue before the Ninth Circuit was not whether employees may ever agree to arbitrate statutory employment claims; they can. The issue is whether these particular employees entered into such a binding arbitration agreement, thereby waiving statutory court remedies otherwise available. The congressional concern that Title VII disputes be arbitrated only "where appropriate," and only when such a procedure was knowingly accepted, reflects our public policy of protecting victims of sexua

discrimination and harassment through the provisions of Title VII and analogous state statutes. See ***Alexander,*** 415 U.S. at 47. This is a policy that is at least as strong as our public policy in favor of arbitration. In the ***Prudential v. Lai*** case the Court said "even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits."

In Petitioner's case, when Meyer was fired, it was the first example of two and one half years of ongoing harassment and discrimination. Appendix D is an exhibit that was accepted as evidence by the arbitrators during the arbitration. On a single sheet of paper it summarized the hostile work environment sexual harassment that Meyer was forced to undergo at the behest of Shearson. When she signed her U-4 on October 5, 1987, there is no rational way that she would have or could have knowingly forfeited her statutory rights, especially with the knowledge that her manager already believed he could fire her without cause.

E. The arbitration appeal process undermines Supreme Court precedent and permits distortion of Civil Rights Law.

The crux of the Motion to Vacate is knowing that vacatur of an award is virtually impossible. The Motion to Vacate in this case was filed July 19, 1994 following an award of $0 by the New York Stock Exchange arbitration panel. Appendix B is a clear, logical and well documented opinion by the Judge for this case at the United States District Court in denying the Motion to Vacate on November 4, 1994. Judge Fawsett did two remarkable things. She responded to arguments by a layperson (Petitioner proceeding pro se) and she made it clear where one must look to seek possible areas of vacatur that may, if they exist, fall within the arbitration appeal process of the Eleventh Circuit.

On November 21, 1994 Petitioner filed a request for rehearing to consider new evidence. In question was a document submitted by Shearson at the arbitration, that Petitioner alleged to

be fraudulent. The document was a handwritten "tracking sheet" created, produced and used exclusively by the Shearson Branch Manager (the alleged perpetrator of the harassment and discrimination). It was the sole piece of documentation that Shearson submitted to "prove" poor performance from 1987 through 1988. It was not listed as an exhibit prior to the arbitration, and affidavits have been submitted to the District Court verifying that many of the handwritten numbers are false including numbers that the Branch Manager had said occurred during a week when Petitioner was at a Shearson sponsored training session in Chicago, and was not even in the branch office. Because of time constraints for the appeal process, this matter has been deferred at the District Court. At this time it is unknown whether this matter will be sufficient to Vacate the Award based on 9 U.S.C. Section 10 (a) (1) Where the award was procured by corruption, fraud, or undue means.

However, the purpose of this section is to address the Motion to Vacate and how arbitration and the arbitration appeal process have served to undermine various Court and Supreme Court decisions relating to Civil Rights in this case. Petitioner moved to vacate the arbitration award based on "undue means". During the arbitration proceedings counsel for Shearson made several misstatements of law and/or fact in defining sexual harassment, retaliation and damages under Title VII.

Concentrating on the sexual harassment, Shearson stated (their closing transcript was included as Doc 63 Attachment B) "there is no basis for sexual harassment". Their assertion was that sexual harassment involved some form of sexual advances or purely sexual action. Their misstatements referred to "come-on's" and "being hit on" as that which was representative of sexual harassment. Petitioner's counsel countered with direct quotes from ***Harris v. Forklift Systems, Inc.*** 114 S.Ct. 367 (1993), ***Meritor v. Vinson*** 477 U.S. 57 (1986), ***Hall v. Gus Construction Co. Inc.,*** 842 F.2d 1010, 8th Cir (1988), ***Delgado V. Lehman,*** 665 F.Supp. 460 . E.D. Va., (1987) and ***McKinney v.***

Dole 765 F.2d 1129 (D.C. Cir. 1985) and defined hostile work environment as a form of sexual harassment relying more on "conduct that interferes with performance or creates an intimidating, hostile, or offensive working environment using a reasonable woman standard". Petitioner's counsel provided each of the arbitrators with copies of the cases after emphasizing the correct usage of hostile work environment.

The futility of this line of reasoning is that it made no difference. Even if the arbitrators understood the correct definition, the Court is not permitted to vacate on the merits of the case or for misstatements or any form of "undue means". Shearson was quick to point out in ***AG. Edwards & Sons, Inc. v. McCollough***, F.2d 1401 (9th cir. 1992) "courts should not reverse even in the face of erroneous interpretations of law." They continued to address undue means ***A.G.Edwards*** in the context of "sloppy or overzealous lawyering" as follows:

> "Offering a meritless defense, however unfortunate, is part and parcel of the business of litigation; it carries no connotation of wrongfulness or immorality. In addition, it occurs with such frequency that were the district court's rule to be adopted, the federal courts would be required to overturn arbitration awards regularly as procured by "undue means." This would be inconsistent with the extremely limited scope of judicial review of such awards."

By misleading and misstatements and half-truths Shearson successfully overturned two Supreme Court decisions and three Circuit Court Opinions that Petitioner cited, the Civil Rights Act of 1964, the Civil Rights Act of 1991 and various iterations of EEOC Guidelines that the arbitrators chose to ignore and the Courts are unable to do anything about. This is just one small example of the arbitration process that is in non-compliance with the intent of Title VII, the rules and regulations of the NYSE, the Federal Rules of Evidence and judicial precedence.

REASON FOR GRANTING THE WRIT

I. The decision of the Eleventh District Court of Appeal fails to take into account the numerous decisions of this Court with respect to "the right to the aid of counsel as a fundamental element of due process of law" and "the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice".

The Fifth Amendment to the Constitution of the United States is "due process of law". Its intent is to restrain the Federal Government from depriving any person of life, liberty, or property without due process of law. The basic elements of "due process" include:

* the right to notice
* the right to hearing
* the right to retain counsel

There also exists the plain error rule in which legal impropriety has affected substantial rights. Petitioner is requesting that this Court having reviewed the Statement of the Case (Section A and B) exercise its supervisory power over activities that have occurred in the lower Courts.

Specifically, Petitioner has been denied her right to due process through a minimal three day notice of a hearing, without counsel or sufficient time to retain counsel and attendance during a telephone conference in which Petitioner was without access to phone lines and ultimately attended an ex parte hearing. Because this hearing was scheduled to address a Motion to Compel Arbitration, it was an unfair hearing as well as a denial of due process. There was no way to participate.

Discovery of the events leading up to the ex parte hearing were not uncovered until Petitioner was in the arbitration appeal process and upon obtaining documents from the Court record, was able to reconstruct what had taken place. A miscarriage of justice

was permitted to occur through the removal of Petitioner's case from an already scheduled trial by jury into an arbitration and a subsequent delay of two additional years. Petitioner seeks the preservation of the integrity and reputation of the judicial process by rectifying this situation and remanding for the continuation of a jury trial.

II. This Court's recent decision to let stand a 9th Circuit Court decision where Securities industry employees may only be forced to forgo statutory remedies and arbitrate claims if one "knowingly" agreed to submit such disputes to arbitration.

In the October 3, 1995 decision of this Court to let stand the 9th Circuit's decision in ***Prudential Ins.Co. v. Lai,*** 42 F.3d 1299 (9th Cir. 1994) a measure of equity is being returned to the process of voluntary vs. involuntary arbitration as it relates to Civil Rights matters and employment disputes. While the Eleventh Circuit issued its ruling prior to the decision of this Court, this case and issue was properly before the Eleventh Circuit. By affirming the decision of the lower court, the Eleventh Circuit compelled an arbitration in conflict with the decision of the Ninth Circuit and this Court's cert. denied. Petitioner request this to be acknowledged and the Eleventh Circuit's decision reversed.

III. The decision and opinion of this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct/ 1647 (1991) falls short of providing a fair and equitable resolution for civil rights cases through the use of arbitration.

The subtle distinctions that manifest themselves in behavior and actions that are considered discriminatory, become lost in the application of the Federal Arbitration Act (FAA). FAA is a law that was written in 1925, long before the creation of the environment that cultivated the Civil Rights Act of 1964. To apply 1925 standards and criteria to the situations that exist today, is to discount the evolution of words or the word "bias" from what it referred to in 1925 to what it normally refers to today.

In Appendix B, which is the District Court's denial of the Motion to Vacate, Petioner had identified one of the arbitrators as sleeping 45-55% of the time during the arbitration proceedings. In order to comport with the "narrow" ways that one has available to overturn an arbitration award, the standard for "evident partiality" is so high as to not even come close to covering the types of behavior that under one law may be suspect, but under FAA are merely amusing.

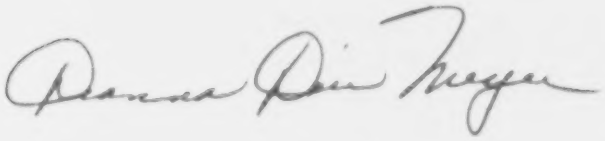
The matter of the misstatements used in Section E as it related to the term sexual harassment further illustrates the difficulty in applying law and definitions to terms that are still evolving. The subtle distinctions are what is unique and definable in Title VII claims on a case by case basis, but fail to receive their proper place under FAA. In arbitration one must educate as well as prove ones case, but do it in a simple, informal and expeditious manner. Meyer's attempt to do that was the development of a "workbook" to be used during the proceedings. Shearson requested that it be thrown out, and it was.

The list of irregularities that Petitioner Meyer experienced in the arbitration process would never be permitted in a Court of Law. As such the promise of "simplicity, informality and expedition" is nothing more than an excuse to restructure how or if Civil Rights Title VII law will be addressed in the various industries that use arbitration clauses in their licensing, employment or other contractual documents. Any semblance to truth and justice is being redefined, not by law, but by private industry.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



Dianna Dair Meyer, Pro Se

DO NOT PUBLISH

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3494
Non-Argument Calendar

D.C. Docket No. 91-193-CIV-ORL-19

DIANNA D. MEYER,

Plaintiff-Appellant,

LINDA C. FRANK; HERMAN K. GOLNIK, JR.

Plaintiffs,

versus

SHEARSON LEHMAN BROTHERS, INC.,
fka Shearson Lehman Hutton, Inc.,

Defendant-Appellee.

Appeal from the Untied States District Court
for the Middle District of Florida

(August 29, 1995)

Before TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Appellant contends that the district court erred in compelling arbitration of her claims and, following arbitration, in denying her motion to vacate the arbitration award. We find

no error; as the district court held, appellant was contractually obligated to arbitrate her claims.

AFFIRMED.

A True Copy

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO FLORIDA

DIANNA DAIR MEYER,
Plaintiff,

v. CASE NO. 91-193-CIV-ORL-

SHEARSON LEHMAN BROTHERS, INC.
Defendant,

ORDER

This case is before the Court upon Plaintiff's Motion to Modify Order (Doc. No. 62, filed September 15, 1994), Amendment A to Motion to Modify Order (Doc. No. 67, filed October 18, 1994), Defendant's Response to Plaintiff's Motion t Modify Order (Doc. No. 64, filed September 30, 1994) and Defendant's Response to Plaintiff's Second Motion to Vacate (D No. 65, filed October 6, 1994). The Court has also reconsidered Plaintiff's Motion to Vacate Award and supporting Memorandun of Law (Doc. No. 53, filed July 19, 1994), Plaintiff's Change Pa to Plaintiff's Motion to Vacate Award (Doc. No. 54, filed July 2 1994), Plaintiff's Changing Public Policy: Additions to Motion t Vacate Award (Doc. No. 59, filed August 19, 1994) and Defendant's Response to Plaintiff's Motion to Vacate (Doc. No. filed August 15, 1994).

Background [2]

This Court referred Plaintiff Dianna Dair Meyer's discrimination lawsuit against her former employer Shearson Lehman Brothers, Inc. to binding arbitration. (Doc. No. 29, filed May 13, 1992). On April 19, 1994, a three person arbitration panel from the New York Stock Exchange awarded Plaintiff $0, with "costs against Respondent." (Doc. No. 53, Exh.1). Plaintiff's first Motion to Vacate Award was filed July 19, 1994. (Doc.No.53). As grounds therefor, Plaintiff alleged: (1) the arbitration award was procured by corruption, fraud, or undue means in violation of 9 U.S.C. Section 10 (a) 2 of the Act, (3) the award was in manifest disregard of the law or arbitrary and capricious, and (4) the award was contrary to public policy. In its Order at Docket Entry 61, this Court deferred ruling on Plaintiff's Motion to Vacate Award, directed Plaintiff to file a complete transcript of the arvbitration proceedings for the Court's review, and reserved the possibility of holding an evidentiary hearing.

Plaintiff moved to modify the aforementioned Order, contending that temporal and financial constraints preclude her compliance. Plaintiff further contends, notwithstanding this Court's observation to the contrary, that "sufficient

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2 A detailed discussion of the factual allegations undeerlying the claim is unnecessary given the limited scope of review afforded the Court in the instant Case.

grounds have already been stated and justified to honor a request to vacate." Plaintiff has also filed a second motion to vacate.

The Court has carefully reviewed the case file and considered all arguments raised in support of and in opposition to the Plaintiff's motions to vacate the arbitration award. The Court now reconsiders its prior order. The nebulous nature of the Plaintiff's allegations, the particular facts of the case as alleged by the Plaintiff and the presumption against vacatur of arbitration awards persuades the Court that it is unnecessary to require the Plaintiff to submit the transcripts that the Court previously requested. Plaintiff's allegations, even if true, are legally insufficient to warrant vacatur of the arbitration award.

CONCLUSIONS OF LAW

In a formidable line of cases, the Eleventh Circuit has recognized the federal policy favoring arbitration, noting that the Federal Arbitration Act ("the Act") was enacted to relieve congestion in the courts and provide parties with a less expensive and speedier means of dispute resolution. See, e.g., Robbins V. Day, 954 F.2d 679, 682 (11th Cir. 1992), cert denied sub nom Robbins v. PaineWebber, Inc., 113 S.Ct. 201, (1992); Raiford v. Merrill Lynch,Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1991); O.R. Securities v. Professional Planning Assoc., 857 F.2d 742, 745-46 (11th Cir. 1988); accord Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332, 2337 reh. denied 108 S.Ct. 31 (1987). Accordingly, the Act

presumes that reviewing courts will confirm arbitration awards and that judicial review of the arbitration process will be severely limited. See Brown V. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 778-79 (11th Cir. 1993); Booth v. Hume Publishing Inc., 902 F. 2d 925, 932 (11th Cir. 1990).

Title 9 U.S.C. Section 10 of the Act strictly limits the situations in which vacatur is permitted. Section 10 provides in pertinent part:

> (a) In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any part to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

This statute does not permit reviewing courts to "roam unbridled

in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways." Robbins 954 F. 2d at 683.

In addition to the grounds for vacatur provided in Title 9, some courts have found that an award should be vacated when the award is "arbitrary or capricious," or if enforcement of the award is contrary to public posicy. See Raiford 903 F.2d at 1412 (citation omitted); Brown, 994 F.2d at 779 (citations omitted). Only the latter two additional grounds have been recognized by the Eleventh Circuit. See Brown, 994 F.2d at 779, n3. Plaintiff has alleged that the award was in manifest disregard of the law and was contrary to public policy. She also raised two evidentiary concerns.

Corruption, Fraud or Undue Means

The Eleventh Circuit has adopted a three-part test to determine whether an arbitration award should be vacated under Title 9 U.S.C. Section 10 (a). Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988). The movant must prove: (1) the existence of fraud by clear and convincing evidence; (2) that the fraud was not discoverable upon the exercixe of due diligence peior to or during the arbitration; and (3) that the fraud materially related to an issue in the arbitration, i.e. that it deprived the party of a fair hearing, although no showing that the fraud affected the result is required. Id. (citations omitted).

Plaintiff alleges that the arbitrators' decision was procured

through fraud or undue means. She contends that the arbitration process was compromised because counsel for the Defendant allegedly made several misstatement of law and/or fact during the proceeding. Specifically, Plaintiff takes issue with the summation of Respondent's counsel which characterized hostile work environment claims as necessarily including sexual harassment. She claims that this is a critical misstatement of the law. She also contends that Defendant's counsel made misstatements relative to retalation charge and to applicable law on damages under TitleVII.

Plaintiff and her counsel were present at the hearing and presumably could have responded to the alleged misrepresentations at or near the time that they were made Plaintiff does not report whether her counsel brought the alleged misstatement to the arbitrators' attention during the hearing. However, even had the alleged misstatements occurred, gone uncorrected and been accepted by the arbitration panel, courts are generally not permitted to grant vacatur on the basis of errors of law or interpretation. Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992) cert denied 113 S. CT. 1269 (1993); O.R. Securities v. Professional Planning Association, 857 F.2d 742, 746 (11th Cir. 1988) citing Wilko v. Swan, 74 S.Ct. 182 (1953) overruled on other grounds Rodriguez de Quijas v. Shearson/American Express Inc., 109 S.Ct. 1917 (1989). This Court is not permitted to

substitute its own judgment for that of the arbitrators. See O.R. Securities v. Professional Planning Association, 857 F.2d at 747. The Court is unaware of any cases which support Plaintiff's conclusion that a misstatement of fact or law rises to the level of "undue means."

Evident Partiality or Corruption in the Arbitrators.

In Commonwealth Coatings Corp. v. Continental Casualty Co., 89 S. Ct. 337 (1968) reh. denied 89 S.Ct. 848 (1969), the Supreme Court considered the partiality of an arbitrator who had acted over a period of five years as a consultant for the prevailing party. In its ruling to set aside the arbitrator's award for evident partiality, the plurality opinion stated that arbitrators "not only must be unbiased but also must avoid even the appearance of bias." Commonwealth, 89 S.Ct. at 339-40. However, Justice White in casting the fifth vote maintained that a substantial relation must exist between the arbitrator and the party before evident partiality is established; a trivial relation is insufficient to violate 9 U.S.C. Section 10 (b). Id. at 340-41. Accord Lozano v. Maryland Cas. Co., 850 F.2d 1470, 1471 (11th Cir. 1988) cert. denied 109 S.Ct. 1136 (1989); Austin South I, Ltd. v. Barton-Malow Co., 799 F.Supp. 1135, 1141-42 (M.D. Fla. 1992);

The Eleventh Circuit has held that any conduct by a neutral arbitrator that creates a reasonable appearance of bias warrants setting aside an arbitration award on the ground of evident partiality. Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753, 758 (11th Cir. 1993) cert. denied 1994 WL 372926 (Oct. 3, 1994) (citations omitted).[3] The onus of proving facts which would establish a reasonable impression of partiality rests on the party challenging the award. Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1201 (11th Cir. 1982). Middlesex requires that the bias be "direct, definite and capable of demonstration rather than remote, uncertain and speculative. Middlesex, 675 F.2d at 1202; Lozano v. Maryland Casualty Col, 850 F.2d 1470, 1471 (11th Cir. 1988). The burden for vacating an arbitration award is heavy; the moving party must prove that the arbitrator had "a personal interest in the proceedings, whether pecuniary or otherwise, which would have biased his or her judgment in the proceedings." Austin South I,Ltd. v. Barton-Malow Co., 799 F.Supp.1135, 1142 (M.D. Fla. 1992).

In Austin South I, Ltd. v. Barton-Malow Co.,799 F.Supp. 1135 (M.D. Fla 1992), the court considered evidence similar

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[3] This appears to be an extension of the cases cited in Sunkist. See Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982) (moving party must prove facts which would establish a reasonable impression of partiality); Lozano v. Maryland Casualty Company, 859 F.2d 1470 (11th Cir. 1988) (existence of any dealings which might create an impression of possible bias that is direct, definite and capable of demonstration show evident partiality under Florida Statues)(emphasis added).

to Plaintiff's contentions in the instant case and did not find evident partiality. The Austin plaintiff submitted affidavits in support of its assertion that one of the arbitrators had exhibited bias during and after the proceedings. One affiant stated that during the proceedings he "gained the impression that [the arbitrator] was not impartial." The observer also saw the arbitrator speaking one-on-one with one of the parties. The seco affiant asserted that during the arbitration proceeding the alleged biased arbitrator "appeared to take detailed notes during [the prevailing party's] presentation, but appeared disinterested and took very few notes during [the losing party's] presentation." Th court found that these affidavits were insufficient to support a finding of partiality because they were conclusory and were not supported by any specific facts. 799 F.Supp. at 1143.

In the instant case, Plaintiff has not submitted affidavits support of her motion but contends that "[b]ased on the visual observations and one on one chats that took place during breaks, Mr. Pender [one of the three arbitrators] made his decision befor he ever walked into the arbitration." Plaintiff also maintains that

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4 It is not apparent from Plaintiff's motion whether she had the chats with the arbitrator in question or merely observed them. If the latter is the case, the Court notes that "[t]he mere fact that an arbitrator may have conversed with a party at some point during the proceedings is insufficient to establish 'evident partiality.'" Austin Stout I,Ltd. v. Barton-Malow Co., 799 F.Supp. 1135, 1143 (M.D. Fla. 1992)(Citations omitted).

Mr. Pender dozed off and was generally inattentive during the proceeding. Plaintiff further contends that the bias was heightened because, she speculates, the other arbitrators deferred to Mr. Pender because of his position as a lawyer and as the "elder 'statesman.'" These vague and speculative allegations are insufficient to support a finding of evident bias.

While Mr. Pender's alleged behavior of indulging in periodic siestas during the proceedings may have been somewhat less than professional, Plaintiff's allegations neither suggest not prove any interest, pecuniary or otherwise, that Mr. Pender may have had in the outcome of the proceeding. Therefore, Plaintiff's unsworn allegations, even if accepted by this Court as true, are insufficient as a matter of law to warrant an evidentiary hearing or to support a finding by this Court of evident partiality. See O. R. Securities, Inc. v. Professional Planning Associates, Inc., 857 F.2d 742, 746 and n.3 (11th Cir. 1988).

Manifest Disregard of the Law

Plaintiff argues that the arbitrators' decision should be vacated because it was in manifest disregard of the law. Plaintiff's argument on this point also includes the contention that the award was arbitrary and capricious. The Eleventh Circuit has not recognized manifest disregard of the law as a basis for vacating an arbitration award. Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 779 n.3 (11th Cir. 1993). Therefore, the Court will treat Plaintiff's allegations as an attack on the award on the latter

grounds.

The Eleventh Circuit has held that where no rationale is given for an arbitration award, a Court reviewing a motion to vacate the award on non-statutory grounds must look to the award itself to determine if there is a rational basis for the award. Brown, 994 F.2d at 779 (citations omitted). The Plaintiff bears the burden of refuting every rational basis upon which the arbitrators could have relied. Id. If there is a proper basis for the award, the party seeking vacatur may not invoke the non-statutory bases as grounds for vacating the award. Id. (citations omitted). Non-statutory grounds may be raised to challenge arbitration awards which are not silent as to their rationale. Id (cite omitted).

The instant arbitration award does not include a rationale for the decision. Although under Brown, it appears that Plaintiff is not entitled to challenge the award on non-statutory grounds, for sake of completeness the Court considers Plaintiff's arguments.

First, Plaintiff contends that the award was arbitrary and capricious because it failed to include any damages. It appears that Plaintiff assumed that defense counsel's discussion about limitations on damages under Title VII during the arbitration proceeding was an admission that discrimination had occurred. This assumption is improper. Arguments by counsel are neither evidence nor admissions.

Plaintiff further alleges that the award is arbitrary and capricious because a ground for the arbitrator's decision cannot be

inferred from the facts of the case. See Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) cert denied 113 S.Ct. 1269 (1993). This argument is also without merit. A logical inference from the award is that the panel concluded that the Plaintiff failed to prove that she had been discriminated against because of her sex. Therefore, this Court cannot find that the award had no factual or legal basis.

Public Policy Considerations

In limited circumstances, public policy considerations can warrant vacatur of an arbitration award. In Delta Air Lines v. Air Line Pilots Ass'n Inter., 861 F.2d 665 (11th Cir. 1988) cert. denied 110 S.Ct. 201 (1989), the Eleventh Circuit held that an arbitrator's award which violated clearly established public policy was properly overturned by the district court. In Delta, the undisputed facts were that a Pilot-in-Command was discharged by Delta for operating a passenger aircraft while intoxicated. The arbitrators found "[i]n a confusing three-to-two opinion" that the discharge was without cause, ordered reinstatement and ordered Delta to pay for the costs of the alcohol rehabilitation program in which the pilot had asked to participate only after his discharge. Id. at 668. The district court overturned the portion of the arbitrators' decision which ordered reinstatement, finding that enforcement of the award finding no just cause for discharge would violate clearly established public policy against allowing pilots of airlines to operate aircraft while under the influence of

alcohol. The award requiring Delta to reimburse the costs of the rehabilitation program was affirmed as the court found it did not violate public policy. On appeal, citing to numerous statutes and cases condemning the practice of flying while intoxicated as proof of public policy, the Eleventh Circuit affirmed the district court's order.

In Delta and the cases cited therein, each reviewing court analyzed whether a fait accomplis was a violation of public policy. The courts did not have to consider whether or not the underlying act actually occurred. See N.L.R.B. v. Dixie Motor Coach Corp., 128 F.2d 201, 203 (5th Cir. 1942) (reinstatement to public service position of employee who drives drunk "would do violence to the public welfare and to the purposes of the National Labor Relations Act."); Iowa Electric Light and Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers, 834 F.2d 1424 (8th Cir. 1987) (reinstatement of employee who ordered opening of door system used to protect the public from exposure to harmful radiation to get to lunch more quickly would violate well defined and dominant national policy requiring strict adherence to nuclear safety rules). Furthermore, the Delta court emphasized the rarity of arbitration awards which so offend public policy that they should be set aside. 861 F. 2d at 670.

Momentarily disregarding the Eleventh Circuit's Brown prohibition on using non-statutory bases as grounds for vacatur of an award where no rationale is given, the Plaintiff's claim still

must fail. 994 F.2d at 779. Plaintiff is clearly correct that there is strong public policy against discrimination. Had the panel made the same award after having been presented with undisputed or admitted facts regarding discrimination by the defendant, a violation of public policy could be inferred. This Court understands Plaintiff's interpretation of the events in question and why she believes that the award violated public policy. However, in order to support a conclusion that the arbitration award must be vacated on public policy grounds, this Court must find that the arbitration panel failed to remedy an undisputed violation of the law. See Delta. No such finding can be made.

In the instant case, significant disagreement remains about what transpired during Ms. Meyer's employment and how the events in question are properly interpreted. Plaintiff continues to maintain that she suffered adverse treatment because of her sex, while Defendant contends that any perceived disparate treatment was performance related and not related to Plaintiff's sex.

It is not this Court's function to speculate on the weight of the evidence presented before the arbitration panel or to second guess the panel's interpretation of that evidence. A de novo review of the facts of the instant case based on one party's dissatisfaction with the award would defeat many of the public policy reasons behind arbitration. The only evidence of the arbitrators' finding that is currently before this Court is the award of $0 damages for Plaintiff and an assessment of costs against the Defendant. The

record before this Court does not support the position that the arbitrators found that the Defendant discriminated but nonetheless failed to award the Plaintiff any damages. Therefore this Court cannot overturn the award as violative of the public policy against sex discrimination.

Plaintiff also contests the mandatory nature of the arbitration and suggests the evolution of a public policy against mandatory arbitration. As evidence Plaintiff has attached a copy of Senate Bill 2012 which would amend the Civil Rights Act of 1964 and other civil rights laws to prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration. (Doc. No. 63, attachment D.) Without passing on the wisdom of proposed legislation, the Court merely notes that given the capricious nature of the legislative process, the mere fact that a piece of legislation has been filed can not be construed as dispositive proof of a change in public policy. Furthermore, predispute agreements to arbitrate claims are enforceable. See e.g., Rodriguez de Quijas v. Shearson/American Express Inc., 109 S.Ct. 1917 (1989).

Evidentiary Matters:

1. Presence of Testifying Witnesses at Hearing

Plaintiff contests the propriety of the presence of two of the Defendant's testifying witnesses in question, Gerald Helmich, Shearson Branch Manager during Ms. Meyer's tenure, and Rudy Hlavek, Shearson Regional Manager for the state of Florida, were corporate representatives. Plaintiff maintains that throughout the

testimony, the two men listened, took notes, exchanged data with their attorneys and directly quoted their own past witnesses while testifying, whereas she was allegedly told that her husband could not be present only if he was not going to be a witness.

Federal Rule of Evidence 615 provides:

> At the request of the party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Assuming arguendo that Rule 615 or an analagous rule applied to the arbitration proceeding, Plaintiff has not contended. that counsel attempted to invoke the rule of sequestration of witnesses or that any objection to the witnesses' continual presence was made at the hearing. Furthermore, at least one of the men would likely fall into a non-excludable category. In at least one case the Eleventh Circuit has held that a technical violation of the rule of sequestration may not be raised for the first time on appeal, although that case is factually dissimilar because the person's status as a testifying witness was not known at the time the rule was invoked. United States v. Beard, 775 F.2d 1577, 1580 (11th Cir. 1985) cert. denied 106 S.Ct. 1235 (1986) (courtroom deputy's testimony that defendants had switched shirts during trial

to hinder indentification was not plain error affecting substantial rights).

Further assuming that the rule was properly invoked, which Plaintiff has not alleged and Defendant specifically denies (Doc. No. 65, at 8), Plaintiff has failed to argue that she was prejudiced by the alleged violation of the rule. Absent prejudice or connivance, a violation of the rule is insufficient to warrant a vacatur. See United States v. Jimenez, 780 F.2d 975, 980 (11th Cir. 1986). Plaintiff has alleged that Mr. Hlavek and Mr. Helmich quoted from other witnesses' testimony but she did not claim that the testimony of other witnesses influenced the two men in any way other than to corroborate their own testimony. See United States v. Jimenez, 780 F.2d 975, 980 (11th Cir. 1986). And, the fact that there were two representatives rather than one is inconsequential if no harm resulted. See United States v. Faul, 748 F.2d 1204, 1221 (8th Cir. 1984) cert denied 104 S.Ct. 3500 (1985).

2. Exclusion of Evidence

Plaintiff objects to the arbitration panel's exclusion of "the book." The book was a binder entitled "Shearson Lehman's Arrogance of Power" which Plaintiff compiled for use in the case as an educational tool, a reference manual, an arbitration/litigation comparison and an outline of presentation of her case. Upon objection by the Defendant, the book was not used. Exclusion of the book does not mandate vacatur of the award. Vacatur of an

arbitrator's award for refusing to hear evidence is rare. It is appropriate only when the exclusion of relevant evidence so affects the rights of party that it may be said that he or she was deprived of a fair hearing. Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34, 39-40 (1st Cir. 1985). Furthermore, it is the arbitrators who are the judges of admissibility and relevancy of evidence. Id.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Vacate Award (Doc. No. 53), Plaintiff's Motion to Modify Order of 8/30/94 (Doc No.62) and Plaintiff's Second Motion to Vacate Award (Doc. No. 63.) are hereby DENIED.

DONE AND ORDERED at Orlando, Florida this 4th day of November, 1994.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
Dianna Dair Meyer
Defendant's Counsel of Record

A True Copy

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO FLORIDA

DIANNA DAIR MEYER,
Plaintiff,

v. CASE NO. 91-193-CIV-ORL-9

SHEARSON LEHMAN BROTHERS, INC.
Defendant,

ORDER

This case is before the Court on Defendant's Motion to Modify Court's Order with Respect to Case Management Report (Doc. No. 66, filed October 14, 1994) and Plaintiff's Response to Defendant's Motion to Modify Court's Order with Respect to Case Management Report (Doc. No. 70, filed November 2, 1994). Defendant is correct that the case would properly be designated as a Track One case. However, based on this Court's Order of Nov. 4, 1994, (Doc. No. 71), the motion is **DENIED AS MOOT.**

DONE AND ORDERED at Orlando, Florida this, 6th day of November, 1994.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
Dianna Dair Meyer
Defendant's Counsel of Record

A True Copy

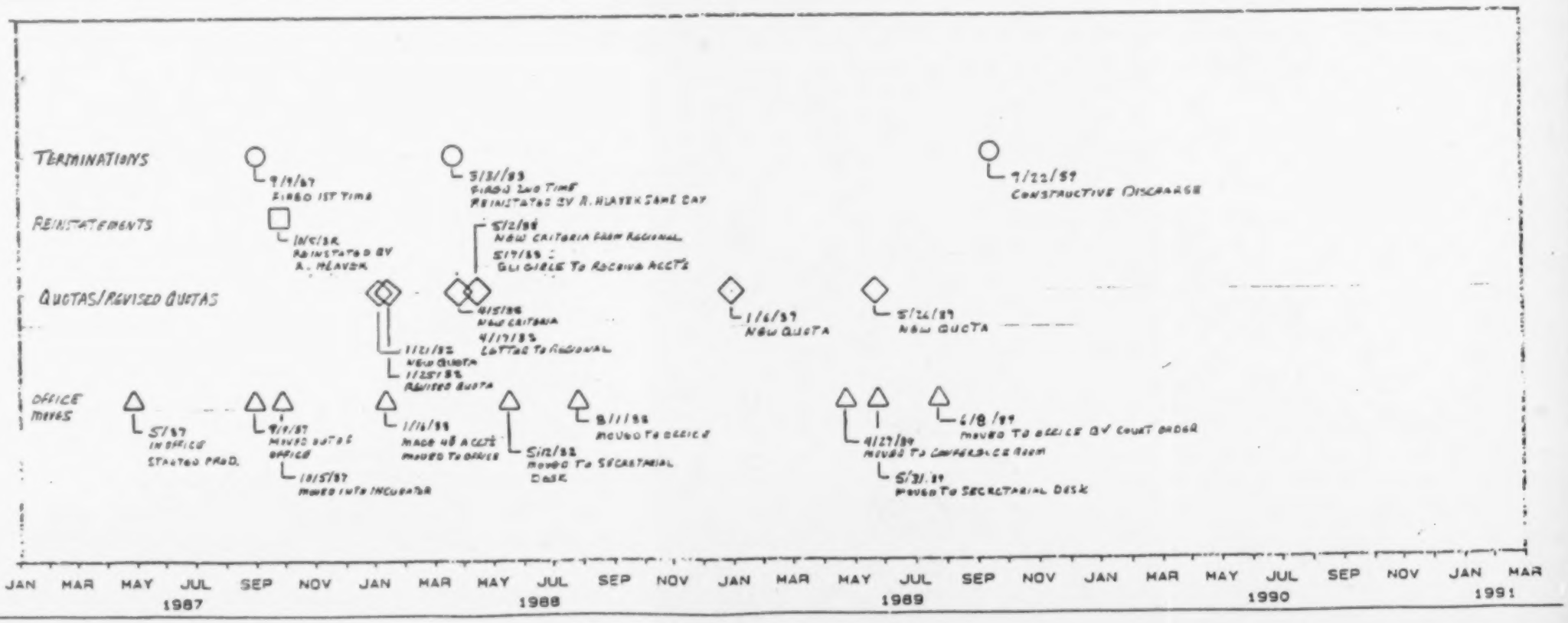
BEST AVAILABLE COPY

APPENDIX D

TIME HISTORY

SEQUENCE OF EVENTS

MAR 24, 1994
DIANNA D. MEYER



-ISTORY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 95-824

Supreme Court, U.S.
FILED
DEC 14 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

Dianna Dair Meyer,

Petitioner,

vs.

Shearson Lehman Brothers, Inc.

Respondents.

Supplement to
Petition for a Writ of Certiorari to the
United States Court of Appeal Eleventh Circuit

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

Dianna Dair Meyer
Pro Se
125 Primrose Drive
Longwood, FL 32779
(407) 788-1698

QUESTION 4 - REVISED

4. If the deferred Motion to Vacate at the District Court is vacated, based on Federal Arbitration Act 9 U.S.C.Section 10 and the alleged fraudulent evidence presented by Respondents during the arbitration, conforms to the three part test used to identify fraud by ***Bonar v. Dean Witter Reynolds, Inc.***, 835 F.2d 698 (11th Cir. 1988), will this sexual harassment, sexual discrimination, age discrimination, retaliation and constructive discharge civil rights case be sent back to arbitration or will it be sent to trial with a judge and jury.

Appendix E is a true copy of the United States Court for the Middle District of Florida Orlando Division ORDER dated November 15, 1995 and received November 17, 1995. Because the Petition for Writ of Certiorari was already at the printers, this Supplement to the Petition for a Writ of Certiorari is being added to revise and address Question 4. Since the Motion to Vacate is no longer deferred at the District Court based on the ORDER the corrected question 4 should read:

4. Whether this Court is in agreement that the Motion to Vacate by Petitioner based on Federal Arbitration Act 9 U.S.C. Section 10 and the alleged fraudulent evidence presented by Respondents during the arbitration, conforms to the three part test used to identify fraud by ***Bonar v. Dean Witter Reynolds, Inc.***, 835 F.2d 698 (11th Cir. 1988) and would be sufficient grounds for vacatur.

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B. The fraud was not discoverable upon the exercise of due diligence prior to or during the arbitration.
C. That the fraud materially related to an issue in the arbitration.

Reasons for Granting the Writ..... 7

I. The Motion to Vacate the arbitration award in NYSE Case No. 1993-003185 should be permitted because the "tracking sheet" presented by Shearson is an example of false evidence.

II. The ORDER entered on November 4, 1994 and included as Appendix B page B-17 states "Vacatur of an arbitrator's award for refusing to hear evidence is rare".

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In The

Supreme Court of the United States

October Term, 1995

Dianna Dair Meyer,

Petitioner,

vs.

Shearson Lehman Brothers, Inc.

Respondents.

Supplement to
Petition for a Writ of Certiorari to the
United States Court of Appeal Eleventh Circuit

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

This supplemental brief is submitted to update the petition based on Supreme Court Rule 15.8 where an "intervening matter not available at the time of the party's last filing" requires an update to reflect an ORDER that was filed on November 15, 1995 and received by Petitioner after the Writ had been sent to the printer's. Supreme Court Rule 14.1 (a) states "only questions set out in the petition, or fairly included therein, will be considered by the Court". Petitioner is attempting to rectify any misstatement in question 4 based on the Court's ORDER of November 15, 1995 and added as Appendix E.

STATEMENT OF THE CASE

On April 19, 1994 a three person arbitration panel of the New York Stock Exchange rendered a $0 award to Plaintiff in Case No. 1993-003185 following four days of testimony, witnesses and exhibits covering charges of sexual harassment, sexual discrimination, age discrimination, retaliation and constructive discharge. This supplemental petition addresses the Motion to Vacate an arbitration award filed July 19, 1994 with the United States District Court Middle District of Florida Orlando Division. On November 4, 1994 the Court issued its ORDER which was included as Appendix B of Petitioner's original submittal.

Additional information became available to Petitioner and on November 21, 1994 a request was made to consider new evidence of a fraudulent document which had been submitted by Respondent during the arbitration. Petitioner cited the Court's ORDER (Appendix B) page 5 where it stated that "the Eleventh Circuit has adopted a three-part test to determine whether an arbitration award should be vacated under Title 9 U.S.C. section 10(a). ***Bonar v. Dean Witter Reynolds, Inc.***, 835 F.2d 1378, 1383 (11th Cir. 1988). The movant must prove : (1) the existence of fraud by clear and convincing evidence; (2) that the fraud was not discoverable upon the exercise of due diligence prior to or during the arbitration; and (3) that the fraud materially related to an issue in the arbitration, i.e. that it deprived the party of a fair hearing, although no showing that the fraud affected the result is required."

A. The existence of fraud by clear and convincing evidence.

Appendix G is a copy of Respondent's arbitration Exhibit #12 . It is referred to as a "tracking device" and titled Diana (misspelled) Meyer Class 87-4 and was used by the Shearson branch manager to track performance in the initial stages of the financial consultant trainee program in the Winter Park Branch of

Shearson Lehman Brothers (a.k.a Smith Barney a subsidiary of Travelers Inc.).

Arbitration Exhibit #12 is a fraudulent document. It was presented by Shearson. The document consists of a two page, handwritten sheet of notes used exclusively by the Shearson branch manager in the Winter Park Branch Office. He is the sole person who filled in the numbers and the sole person who had access to that document. He claims that the numbers were given to him by the financial consultants during weekly meetings, but there is no way to verify that the numbers given to the branch manager were the numbers that he wrote down. He alone had control of the data recorded and retained possession of the document.

In reviewing the document there is a white space in the center covering a period of time from 8/31 to 9/28. Meyer was fired on September 9, 1987 without cause. Her accounts, her clients, her ability to make a living were taken from her, and she was told to remove her belongings by close of business that day. Because Meyer had been fired, the word Chicago, which appears in the far left column, is an error. Meyer's class of 87-41 went to Chicago for their one week "final" training session during the week of September 14, 1987. Meyer did not attend, because she was not employed by Shearson at that time.

Petitioner returned to the employment of Shearson on October 5, 1987. Because she had missed the "final" training session for her class, she was rescheduled to go to Chicago the week of November 30, 1987. She was in Chicago the entire week attending training classes from 8:00 a.m. until 6:00 p.m. Monday through Friday. Three affidavits have been submitted to the Court verifying that Meyer was in Chicago and attended the training classes during the week of November 30, 1987. The affidavits include the following:

1) Herman K. Golnik, Jr.(Doc.73,Exhibit L)
2) Robert Hyde (Doc.81)
3) Frank Grossman (Doc.82)

The numbers that Shearson has entered for Petitioner on the "tracking sheet" for the week of November 30, 1987 are an example of false evidence. Petitioner never made those calls, contacts or presentations. She never had two appointments, entered on the "tracking sheet", because she was not in Winter Park in the Branch Office. She was in Chicago in a Shearson mandated training class.

Additional fabrications exist and include the week of 11/23 in which Meyer's records show that she had 5 appointments, opened 4 Accounts, made 290 calls, had 162 contacts, identified 31 prospects, took Thanksgiving vacation off and flew to Chicago on United flight 509 departing Orlando 4:08 and arriving 5:44 Sunday, November 29, 1987. A copy of Petitioners calendar was included in Document 92, Exhibit 1 to verify her activities during the week of 11/23. Additional affidavits were secured from former clients to verify the fact that Meyer actually opened 4 Accounts (the tracking sheet shows 2) and brought in assets of $37,000 (the tracking sheet shows $7,000). The additional affidavits include the following:

1) David Harris (Doc.93, Exhibit 1)-opened 2 accounts with a total value of approximately $30,000.
2) Kenyon Eflin (Doc.93, Exhibit 2)-opened an IRA for $2,000.
3) Dilip Parikh (Doc. 93, Exhibit 3)-opened a regular account and purchased a $5,000 annuity.

B. The fraud was not discoverable upon the exercise of due diligence prior to or during the arbitration.

The document under dispute was not provided to Meyer or her legal counsel, Jim Leone, as required by the NYSE Rules of Arbitration within 10 days prior to the actual arbitration sessions. It was not listed on their *Respondent Shearson Lehman Brothers' Exhibit List* for the arbitration which included 46 exhibits. A copy of their Exhibit List was provided in Doc.73 as Exhibit N. The fraudulent document was introduced during the branch manager's

testimony. While a copy may have been lodged with the arbitration panel members and the court reporter, copies were not provided to Meyer, who was the only one who could have validated or reviewed the numbers. The arbitration was held in Clearwater, Florida and Meyer had no access to records, calendars or anything that could possibly help in corroborating the notes on the "tracking sheet".

The fact is, only the branch manager had access to the "tracking sheet" prior to and up until the arbitration. No one in the Shearson offices, other than the branch manager, had it in their possession. Copies were not given to the brokers at the time they were being tracked, or at anytime after tracking took place. There was no way to know if the numbers that the broker gave to the branch manager, which is how he states he obtained the numbers, were the numbers that he actually wrote down. It was a stand-alone, handwritten document that Meyer had not even viewed and only vaguely remembered from six years prior to its surprise introduction at the arbitration. There was no ability for discovery or due diligence without a copy of the document according to NYSE Arbitration Rules.

C. That the fraud materially related to an issue in the arbitration.

The sole purpose of the fraudulent document was to become Shearson's self-serving proof and establish the "pretext" that Petitioner Meyer had a performance problem. The fraudulent document was the only tangible piece of evidence produced by Shearson during the arbitration that was "material" in their attempt to substantiate performance from Petitioner's first employment with Shearson in January, 1987 through December, 1988. Shearson was unable, or unwilling, to produce a solitary report for this time period, which could have been generated by their internal operations computer system.

Even the comparison of performance was not to other

brokers, but to a "handwritten" group of "Weekly Min Goals", again written in by the branch manager across the top of the page. Those numbers are suspect, because the branch manager was the only person who used this document. Since he determined the numbers there would be no reason to place the quotas on the top of the page, unless they were deliberately placed there for the benefit of influencing the arbitrators during the arbitration.

The truth, however, was available in the Workbook, which was discussed in the original filing on page 21. Petitioner had assembled the "workbook" for her arbitration presentation. It was titled Shearson Lehman's Arrogance of Power and an outline was provided as Doc. 53, Exhibit E. Appendix F is a true copy of the workbook outline.

In the workbook Section B.3 - Sexual Harassment, there were extensive references to precedent setting Supreme Court cases including multiple newspaper clips quoting both Justice Sandra Day O'Connor and Justice Ruth Bader Ginsberg on the, then, recently decided ***Harris v. Forklift Systems, Inc.*** 114 S.Ct. 367 (1993) case. Section C included a history of Shearson/American Express from 1989 - 1994 and gave a fairly graphic overview of the corporate culture that existed at Shearson during that period of time. Section D was Petitioner's way of showing how the Securities Industry conducts its business with an emphasis on bottom level, branch business.

Section D also included the following:

D.1 - Organization Chart 1989

D.2 - Organization Chart 1988

D.38 - Summary sheet created by D.Meyer using the performance numbers from Shearson Computer Printouts, which were also included as back-up and identified as pages D.39 through D.51. In reviewing this data which covered performance numbers from June, 1988 through September, 1988 and in comparison with all other brokers in the Shearson Winter Park office, it shows Meyer, not as the lowest producer as claimed by

Shearson, but as the fourth highest producer out of eleven brokers in her similar category.

However, as has been stated in the original filing, the workbook was not permitted to be included as evidence by the arbitrators. Shearson objected, the arbitrators caucused, and the arbitrators refused the workbook even though the data from the workbook had been provided to Shearson's legal counsel 10 days prior to the arbitration as required by NYSE Arbitration Rules. The arbitrators gave no reason, and under the NYSE Rules of Arbitration, are permitted total discretion with the acceptance or rejection of evidence during arbitration proceedings.

REASON FOR GRANTING THE WRIT

I The Motion to Vacate the arbitration award in NYSE Case No. 1993-003185 should be permitted because the "tracking sheet" presented by Shearson is an example of false evidence.

False evidence is fraud. The fraudulent document, "tracking sheet", satisfies the criteria used to determine fraud in ***Bonar v. Dean Witter Reynolds, Inc.,*** 835 F.2d 1378, 1383 (11th Cir. 1988). Petitioner believes that sufficient grounds have been presented to overturn the Eleventh Circuit's per curiam ruling and to vacate this case under Title 9 U.S.C. section 10 (a).

II. The ORDER entered on November 4, 1994 and included as Appendix B page B-17 states "Vacatur of an arbitrator's award for refusing to hear evidence is rare".

In this case Shearson was permitted to establish the pretext of poor performance using a handwritten tracking sheet . The only other source of poor performance was that of the testimony of the branch manager. Shearson's entire case pivoted around the branch manager, and what he said or did to create an illusion of poor performance.

Using the arbitration exhibit which was included as Appendix D in the original submittal, Shearson never disputed that Meyer had been fired not once, but two times by the branch manager. They claimed it was poor performance. However, in each case, the branch manager was overruled and Meyer was returned. Petitioner viewed these events as harassment under the guise of a hostile work environment.

The branch manager placed six (6) separate quota restrictions on Meyer during a span of 16 months, four of which overlapped each other. The question became, which one do you make? In 1987 and 1988 Petitioner made all of her quota's and in several instances exceeded them even while being singled out by the branch manager for the dubious distinction of being "documented". During her two years in production she was forced to move her business equipment and belongings by direction of the branch manager on nine (9) separate occasions. The disruption of each move was sufficient enough to create havoc on any person's performance. The terminations without cause, the forced and unwarranted quotas, the forced moves all set up a pattern and practice of hostile work environment. The pattern and practice was brought to a head when Petitioner and two other female financial consultants were removed from their offices and forced into secretarial desks in hallways in April of 1989. No male financial consultants were similarly situated. None of the women were the lowest producers based on Shearson's own Commission Reports. All three women testified at the arbitration.

All reports in the branch went through the branch manager, and only were made available on an ad hoc basis after the E.F. Hutton people moved into the branch office in May, 1988. It was not until Meyer had access to these reports (identified above in the workbook Section D) that she was able to evaluate her own performance against others, which reinforced the fact that she was not the lowest performer and, in fact, was the fourth highest out of eleven in the same or similar category. These reports were excluded by the arbitrators when they rejected the workbook. The

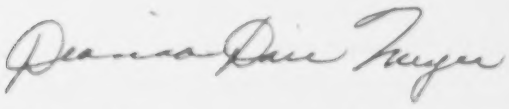
reports were pieces of relevant evidence.

The denial of the use of the workbook as evidence in essence was a denial of a fair hearing and merits vacatur in NYSE Case No. 1993-003185. "It is appropriate only when the exclusion of relevant evidence so affects the rights of party that it may be said that he or she was deprived of a fair hearing. ***Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901,*** 763 F.2d 34, 39-40 (1st Cir. 1985)."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



Dianna Dair Meyer, Pro Se

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DIANNA D. MEYER,
Plaintiff,

vs. Case No. 91-193-CIV-ORL-19

SHEARSON LEHMAN BROTHERS, INC.,
Defendant.

ORDER

The Plaintiff's Request for Rehearing on Motion to Vacate Arbitration Award (Doc. No. 73, filed November 21, 1994), Motion to Supplement the Record (Doc. No. 84, filed February 16, 1995) and Motion to Supplement the Record (Doc. No. 88, filed March 3, 1995) are **DENIED as moot** based on Judgment of the United States Court of Appeals (Doc. No. 96, filed October 30, 1995).

DONE AND ORDERED at Orlando, Florida, this 15th day of November, 1995.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record

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APPENDIX F

ARBITRATION - OUTLINE CLAIMANT
SHEARSON LEHMAN'S ARROGANCE OF POWER

A. Summary of Statement of Claim
B. Shearson's Wrongful Acts Underlying Claim
    1. Breach of Implied Covenant of Good Faith and Fair Dealing - 2 Counts
    2. Undue Stress and Willful and Outrageous Behavior - 5 Counts
    3. Sexual Harassment - 18 Counts
    4. Sexual Discrimination - 2 Counts
    5. Age Discrimination - 1 Count
    6. Retaliation - 5 Counts
        6.a Constructive Discharge - 1 Count
        6.b Unlawful Termination - 1 Count
C. Securities Industry - Shearson/AMEX (1989 - 1994)
    Arbitration Award History
    Ethics/Corruption
    Way of Doing Business
    A Company "Out of Control"
D. Securities Industry - How the Business is Done
    Corporate
    Division
    Branch
E. Selected Rulings
    NYSE Arbitration
    News Articles
F. Remedies Sought
    Compensatoru Damages
    Punitive Damages
    Reasonable Attorney Fees
    Award Basis - to be distributed on last day of Claimant's presentation

A TRUE COPY

Diana Meyer Class 87-4

Weekly Min Goals	Wk of	Calls	250 Contacts	35 Prospects	Appts	15 Presentations	10 Closes	Qualifiers	Issues
	5/26	185	75	4	0	1	0	0	0
	6/1	356	136	27	2	5	2	3	[illegible]
	6/8	191	117	21	1	1	8	–	–
Appts 6	6/15	203	108	9	1	1	1	– 3	–
	6/22	266	155	19	1	1	1	–	–
	6/29	231	152	27	2	3	3	1	[illegible]
	7/6	319	210	32	1	6	6	1	[illegible]
	7/13	283	174	35	5	9	7	2	[illegible]
Appts 10	7/20	235	130	29	3	6	6	0 4	0
	7/27	183	107	18	1	6	6	0	0
	8/3	165	90	22	3	8	5	0	0
	8/10	299	173	37	4	18	11	0	0
Appts 10	8/17	307	188	17	4	28	24	0 0	0
	8/24	252	164	28	4	32	29	3	15,400
	8/31							10	4
	9/7								
Chicago	9/14								
	9/21								
Austin	9/28								
	10/5	374	225	29	7	(Seminar - Unlisted Callers)		1	10,000
26	10/12	408	263	42	3	17	12	0	—
	10/19	427	277	39	5	20	9	3	27,000
Accounts	10/26	383	254	31	4	14	6	1	55,000
	11/2	311	205	22	8	26	15	0	—
	11/9	354	227	29	5	17	13	1	10,000
	11/16	176	85	16	9	9	6	3	62,000
	11/23	140	62	14	5	5	5	2	7,000
1	11/30	325	197	27	2	16	12	1	2,500
	12/7	152	83	8	12	16	15	1	2,000

	Calls	Contracts	Prospects	Appts	Presentations	Closes	Q.A.	Assets
12/14	237	171	16	4	12	10	3	25000
12/21	180	91	11	3	7	7	1	2000
12/28	44	122	26	15	15	11	2 (19)	12,000 31 Dec.
1/4	132	47	3	8	12	12	8	12,000 (41)
1/11	261	192	33	16	13	11	1	44,000
1/18	306	205	37	19	17	14	2	10,000
1/25	218	183	35	14	14	10	0	—
2/1	194	111	23	9	6	5	0	0
2/8	263	159	27	6	18	15	3	174
2/15	208	164	28	8	8	6	0	— (Assets Frozen)
2/22	312	209	35	4	12	10	0 3/5	48,000
2/29	321	201	29	6	14	11	0	
3/7	288	153	25	6	10	7	0	
3/14	345	236	32	6	19	15	1	30,000
3/21	321	211	28	3	17	16	2	60,000
3/28								
4/4								
4/11								
4/18								

No. 95-824

Supreme Court, U.S.
FILED
JAN 16 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

DIANNA DAIR MEYER,

Petitioner,

vs.

SHEARSON LEHMAN BROTHERS, INC., now known as Smith Barney, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GAVIN S. APPLEBY
Counsel of Record
POWELL, GOLDSTEIN, FRAZER & MURPHY
Attorneys for Respondent
Sixteenth Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-6600

QUESTIONS PRESENTED

I. Whether the district court's order compelling arbitration (as upheld by the Eleventh Circuit's per curiam decision) denied Ms. Meyer due process of law under the Fifth Amendment to the United States Constitution.

II. Whether the Eleventh Circuit's affirmance of the district court's order compelling Ms. Meyer's ADEA and Title VII claims to binding arbitration conflicts with the decisions of this Court or the Ninth Circuit.

III. Whether the Eleventh Circuit's decision in *Bender* and/or the Federal Arbitration Act undermine Supreme Court precedent or applicable civil rights law.

IV. Whether the district court (as upheld by the Eleventh Circuit's per curiam opinion) properly rejected Ms. Meyer's efforts to vacate the arbitration award.

A. Whether Ms. Meyer failed to establish that the arbitration award was procured by fraud or undue means.

B. Whether the district court correctly held that the arbitrators properly excluded hearsay evidence offered by Ms. Meyer.

PARTIES INVOLVED

The parent company and subsidiaries (excluding wholly-owned subsidiaries) of Smith Barney, Inc. are listed below.*

1. Parent Company:

   The Travelers Group

2. Subsidiaries:

   Institutional Property Owners, Inc. III

   Smith Barney Acquisition Fund, Inc.

   Smith Barney Commercial Corporation Asia Limited

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* Although Lehman Brothers, Inc. is a separate corporate entity, the Company has a financial interest in the outcome of this case. If Smith Barney is found liable, Lehman Brothers will be partially responsible for any liability.

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No. 95-824

In The

Supreme Court of the United States

October Term, 1995

DIANNA DAIR MEYER,

Petitioner,

vs.

SHEARSON LEHMAN BROTHERS, INC., now known as Smith Barney, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Smith Barney, Inc.[1] respectfully requests that this Court deny Dianna Meyer's petition for writ of certiorari, which seeks review of the Eleventh Circuit's affirmance of two decisions of the United States District Court for the Middle District of Florida. As discussed below, the petition raises no issues worthy of this Court's review.

1. Shearson Lehman Brothers, Inc., the original defendant in this case, now is known as Smith Barney, Inc. For purposes of this brief, Respondent is referred to as Smith Barney, even when the brief discusses events which occurred prior to its name change.

OPINIONS BELOW

This appellate process emanates from two orders issued by the United States District Court for the Middle District of Florida. The first order, entered November 4, 1994 (the "November 4th Order"), is not reported, but is reproduced in Petitioner's Appendix B. The second order, entered November 6, 1994 (the "November 6th Order"), also is not reported, but is reproduced in Petitioner's Appendix C. Because Ms. Meyer's effort to appeal the November 6th Order constitutes, in reality, an appeal of an order compelling arbitration of this case, the United States Magistrate's order compelling arbitration (entered April 23, 1992) and its adoption by the district court on May 13, 1992 are reproduced in Respondent's Appendices A and B.

The Eleventh Circuit Court of Appeals affirmed the November 4th Order and the November 6th Order in a *per curiam* opinion issued on August 29, 1995. The opinion is not reported, but is reproduced in Petitioner's Appendix A.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was based upon 28 U.S.C. § 1331. This Court's potential jurisdiction, however, requires some explanation. First, the district court's November 6th Order denied as moot Smith Barney's motion to modify an inadvertently-issued district court order requesting the parties to submit a standard litigation case management report. Since the November 6th Order is a non-final order, both the Eleventh Circuit and this Court lack jurisdiction under 28 U.S.C. § 1291 to hear that aspect of the appeal. However, giving Petitioner the benefit of the doubt because of her *pro se* status, Ms. Meyer's effort to appeal the November 6th Order appears to be an attempt to appeal a 1992 order compelling arbitration. Although that order also is unappealable due to Ms. Meyer's failure to object to

the underlying Magistrate recommendation, the propriety of the order compelling arbitration is discussed in this brief.

By contrast, the November 4th Order denied Ms. Meyer's request to vacate the binding arbitration award issued in this case. Thus, that order is a final judgment entered by the district court. The Eleventh Circuit therefore had jurisdiction to hear an appeal of that order pursuant to 28 U.S.C. § 1291. Ms. Meyer invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

9 U.S.C. § 10(a)

28 U.S.C. § 1291

The full text of these referenced provisions is located in Appendices C, D, and E.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

Petitioner Dianna Meyer ("Ms. Meyer") alleges that her former employer, Smith Barney, discriminated against her on the basis of age and sex, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). (R. 1-4).[2] Ms. Meyer also alleges retaliation in violation of Title VII and the ADEA. (R. 1-4).

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2. Citations to the Record will be indicated as: R. (volume number) - (document number) - (page number, if applicable).

In May 1989, while employed by Smith Barney, Ms. Meyer filed a charge of discrimination with the Equal Employment Opportunity Commission (the "EEOC"). (R. 1-22, Ex. A-1). Ms. Meyer's initial charge asserted that Smith Barney discriminated against her on the basis of age and gender. (R. 1-22, Ex. A-1). Five months later, after she resigned, Ms. Meyer filed an amended charge asserting retaliation and constructive discharge. (R. 1-22, Ex. A-2). Before the EEOC completed its investigation of either charge, Ms. Meyer obtained a right-to-sue letter. (R. 2-58-2).

Ms. Meyer subsequently filed suit in federal court, based on her charges of discrimination. (R. 2-58-2). Smith Barney denied Ms. Meyer's claims of sex and age discrimination and retaliation, and moved to compel arbitration of the parties' dispute. (R. 1-7; R. 1-21). After the district court granted the motion to compel, Ms. Meyer chose to arbitrate her claims before the New York Stock Exchange. (R. 2-58-2 to 3).

During the course of four days, Ms. Meyer and Smith Barney arbitrated this case. Each party presented considerable evidence in support of their respective positions. (R. 2-58-3). Throughout the arbitration hearings, Ms. Meyer was represented by counsel, James Leone. (R. 2-58-3). After hearing all the evidence, the panel rendered a decision in Smith Barney's favor and dismissed Ms. Meyer's claim. (R. 2-58-3).

On July 19, 1994, Ms. Meyer submitted to the district court (which retained jurisdiction when it compelled arbitration), a lengthy motion to vacate the arbitration award ("First Motion"). (R. 2-53). Smith Barney filed a response to the First Motion, in which it addressed the deficiencies of Ms. Meyer's argument. (R. 2-58). On August 30, 1994, the district court issued an order requiring Ms. Meyer to submit a transcript of the arbitration proceedings. (R. 2-61-2). The court also inadvertently ordered

the parties to file a case management report.[3] (R. 2-61-2). On September 13, 1994, Ms. Meyer submitted a motion to modify the district court's August 30th order ("Meyer's Motion to Modify"), in which she argued that she could not afford the $3,500 cost of the arbitration transcripts. (R. 2-62-2). She then asserted that adequate grounds to vacate had been set forth in her First Motion, and a transcript therefore was unnecessary. (R. 2-62-2 to 3). Smith Barney timely filed a response opposing this second attempt to vacate the award. (R. 3-64). Six days after filing her motion to modify, Ms. Meyer submitted a second (actually it appears to be her third) motion to vacate the arbitration award ("Second Motion"), arguing yet again that the arbitrators' award should be overturned. (R. 3-63). Again, Smith Barney opposed Ms. Meyer's attempt to vacate the arbitration award. (R. 3-65).

On October 14, 1994, Smith Barney filed a motion to modify the district court's order requiring that the parties complete a case management report ("Smith Barney's Motion to Modify"). (R. 3-66). In that motion, Smith Barney noted that the report was unnecessary because this case was a "Track I" case under the local rules of the district court. (R. 3-66-1). Because neither discovery nor a trial is appropriate in Track I cases, the case management report should not have been issued. Ms. Meyer filed a response in opposition to Smith Barney's Motion to Modify. R. 3-70. Ms. Meyer apparently believed that because of the information sought by the case management report, she was entitled to conduct discovery and obtain a trial before the district court, and she apparently perceived that Smith Barney was trying to eliminate those "rights" by its Motion to Modify.

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3. Case management reports are utilized in the United States District Court for the Middle District of Florida to establish discovery and other timetables. They are meant to be issued after the defendant files an answer to a complaint.

On November 4, 1994, the district court issued an extensive order denying Ms. Meyer's attempts to vacate the arbitration award (the "November 4th Order"). (R. 4-71). Two days later, the court issued an additional order stating that Smith Barney's Motion to Modify the case management report was moot given the November 4th Order upholding the arbitration award (the "November 6th Order"). (R. 4-72).

On November 21, 1994, Ms. Meyer filed a request for rehearing ("Request for Rehearing"). (R. 4-73). Before the district court could rule on Ms. Meyer's Request for Rehearing, Ms. Meyer filed notices appealing both the November 4th Order and the November 6th Order. (R. 4-75). On December 9, 1994, the district court issued an order deferring ruling on Ms. Meyer's Motion for Rehearing until the conclusion of Ms. Meyer's appeal. (R. 4-(no document number available)). The Court of Appeals then combined the two appeals. On August 29, 1995, the Eleventh Circuit affirmed the district court's decisions, holding that the court properly compelled arbitration and properly denied Ms. Meyer's request to vacate the arbitration award. Petitioner's Appendix A. On November 15, 1995, the district court denied Ms. Meyer's Motion for Rehearing as moot based on the judgment of the Eleventh Circuit. Petitioner's Supplement to Petition, Appendix A.

B. Statement of Facts.[4]

Ms. Meyer is a former financial consultant (which, in essence, is a stockbroker) at Smith Barney's Winter Park, Florida

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4. Ms. Meyer's Statement of the Case is replete with gross mischaracterization of "facts." Although Ms. Meyer is *pro se*, the procedural history of this case demonstrates that she is familiar with the rules of court. Furthermore, her *pro se* status does not excuse her unjustified personal attacks on the arbitrators, attorneys, and judges in this case. Indeed, her Statement is entirely argumentative, and she *never* cites to the record.

branch office. (R. 1-22-3). Ms. Meyer was employed by Smith Barney (or its predecessor) from January 1987 until she voluntarily resigned her employment on September 22, 1989. (R. 1-22-3). She was hired at the age of 43 by Gerald Helmich, who was then 44. (R. 2-58-2). From the very beginning, Ms. Meyer struggled to produce sales at a desired level, and throughout her employment with Smith Barney, Ms. Meyer consistently was the lowest producer at the Winter Park branch, with the exception of trainees. (R. 2-58-2).

When she became a stockbroker, Ms. Meyer executed a document containing an arbitration agreement. (R. 1-22-4). That document, which is entitled "Uniform Application for Securities Industry Registration," is commonly referred to in the securities industry as a "Form U-4." (R. 1-22-4 to 5). The Form U-4 Ms. Meyer executed obligates her to arbitrate, without limitation, any dispute she may have with Smith Barney or any other member of the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD"):

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . .

(R. 1-22-Ex.C, p. 4, ¶5).

As noted above, one such organization with whom Ms. Meyer registered is the NYSE. (R. 1-22-Ex.C, p. 1). The NYSE provides for arbitration of any controversy between a registered representative and any member. (R. 1-22-5). Smith Barney is a member of both the NASD and the NYSE. (R. 1-22-6). Thus, Ms.

Meyer's claims against Smith Barney are covered by the arbitration agreements she executed.[5] (R. 1-22-6).

Following the filing of the complaint and answer in the district court, and in light of the parties' arbitration agreements, Smith Barney sent Nancy Donnellan, Ms. Meyer's counsel, a letter demanding that Ms. Meyer arbitrate all the claims she had lodged against Smith Barney. (R. 1-22-Ex.E). Ms. Meyer's counsel verbally informed Smith Barney's counsel that she would seriously consider arbitration. (R. 1-22-6). When arbitration proceedings were not filed after a reasonable period of time, Smith Barney renewed its demand for arbitration. The latter demand occurred not long after this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), which is discussed in detail below. (R. 1-22-6 to 7). Ms. Meyer's attorney again stated to Smith Barney's counsel that her client was considering arbitration. (R. 1-22-7). Counsel for Smith Barney responded that Smith Barney would wait as long as reasonably possible before filing a motion to compel, but expressed concern over the passage of time. (R. 1-22-7). Finally, when no response was obtained, Smith Barney filed a motion to compel arbitration ("Motion to Compel") on April 8, 1992. (R. 1-21). The next day, Ms. Donnellan filed a motion to withdraw as counsel for Ms. Meyer. (R. 1-25).

A telephonic status conference was held on April 22, 1992. Ms. Meyer attended that conference in person. (Petition, p. 3). On April 23, 1992, Magistrate Baker granted Ms. Donnellan's motion to withdraw. (R. 1-27-1). At the same time, Magistrate Baker granted Smith Barney's Motion to Compel, noting that Ms. Meyer "personally in open Court stipulated that this matter is

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5. The arbitration requirements of the NYSE and the NASD are virtually identical. (R. 1-22-6 n. 2). The rules of both organizations apply to Ms. Meyer and to Smith Barney. (R. 1-22-Ex.C, p. 1). Ms. Meyer could have arbitrated her case under either the NASD or the NYSE. She chose the NYSE.

subject to binding arbitration." (R. 1-27-2). The Magistrate's order explicitly stated that "failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal." (R. 1-27-2). No such objections were filed. Consequently, on May 13, 1992, the United States District Judge issued an order adopting the report and recommendation of Magistrate Baker and staying the action pending the parties' pursuit of relief through binding arbitration. (R. 1-29).

Ms. Meyer and Smith Barney subsequently arbitrated this case. After hearing all the evidence, a panel appointed by the NYSE rendered a decision in Smith Barney's favor. (R. 2-58-3). Ms. Meyer's relentless attempts to vacate that decision are outlined above.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S ORDER COMPELLING ARBITRATION DID NOT DENY MS. MEYER DUE PROCESS OF LAW.[6]

Ms. Meyer contends that the order compelling arbitration denied her "constitutional right to due process as guaranteed by the Fifth Amendment to the Constitution of the United States of

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6. This Court lacks jurisdiction to hear Ms. Meyer's appeal of the district court's non-final order mooting the case management report (the November 6th Order). However, it appears that Ms. Meyer's intent in appealing the non-final order is to challenge the district court's 1992 order compelling arbitration. Although that order also is unappealable due to Ms. Meyer's failure to object to the Magistrate's recommendation, the following section discusses the propriety of the order compelling arbitration.

America." (Petition, p. i). Specifically, Ms. Meyer states that her due process rights were violated because she received inadequate notice of the April 22, 1992 hearing which compelled arbitration. (Petition, pp. 2-4). Ms. Meyer never raised this issue in the district court, but instead asserted it for the first time on appeal before the Eleventh Circuit.

In general, issues briefed on appeal but not raised before the district court cannot be considered by an appellate court. *See, e.g., Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1060 n. 2 (11th Cir. 1994); *Brickner v. Voinovich*, 977 F.2d 235, 238 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2965 (1993). Since Ms. Meyer did not raise her constitutional due process argument in the district court, this argument is improperly asserted on appeal, and should not be resolved by this Court.

Even assuming, however, that this Court seeks to resolve this issue, Ms. Meyer still cannot prevail. As noted above, Ms. Meyer alleges that she was denied due process because she was not given adequate notice of the hearing (held on April 22, 1992) which compelled arbitration. In making this assertion, Ms. Meyer contends that Smith Barney, the district court, and her own attorney all participated in the alleged violation. However, the due process provision of the Fifth Amendment does not apply to private individuals or corporations unless those parties engaged in state action. *See, e.g., National Broadcasting Co., Inc. v. Communications Workers of America, AFL-CIO*, 860 F.2d 1022, 1024 (11th Cir. 1988). Ms. Meyer has not alleged, nor can she prove, that Smith Barney engaged in any type of state action. *See Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251 (11th Cir. 1985) (employer who obtains a court order or judgment is not engaged in state action merely because it uses the legal process). Therefore, Ms. Meyer has not stated a claim against Smith Barney for a constitutional due process violation.

Further, assuming that Ms. Meyer is alleging that the district court violated her due process rights by not providing her with notice of the hearing held on April 22, 1992, that claim is equally without merit. In a civil case such as this, due process requires only that there exist "proper notice and service of process and a court of competent jurisdiction; procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack." *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). Ms. Meyer does not have a due process claim in this case because she received adequate notice of the April 22 hearing.

On April 7, 1992, when Ms. Meyer was still represented by counsel, the parties submitted a joint motion to the lower court requesting a status conference. (R. 1-19). In a supporting memorandum, the parties informed the Court that Ms. Meyer had refused to arbitrate and that Smith Barney was filing a motion to compel arbitration. (R. 1-20-1). The parties also noted that Ms. Meyer's attorney, Nancy Donnellan, planned to file a motion to withdraw. (R. 1-20-2). However, at that time, Ms. Donnellan remained Ms. Meyer's attorney of record. (R. 1-20-2).

Smith Barney filed its motion to compel arbitration ("Motion to Compel") on April 8, 1992. (R. 1-21). The next day, Ms. Donnellan filed a motion to withdraw as counsel for Ms. Meyer. (R. 1-25). On April 10, 1992, before the district court ruled on Ms. Donnellan's motion to withdraw, the court issued an order granting the parties' joint motion requesting a status conference, and set the conference for April 22, 1992. (R. 1-24-1). In the order, the court directed Ms. Meyer's counsel "to furnish a copy of this Order to her clients and to advise them of the potential consequences of the contemplated motions so they may take steps to protect their interests and to comply with the obligations of litigants in this Court." (R. 1-24-1 to 2). Copies of this order were mailed to counsel of record. (R. 1-24-2).

A telephonic status conference was held on April 22, 1992. Ms. Meyer and Herman Golnik (her then co-plaintiff) attended that conference in person. (Petition, p. 3). One day later, on April 23, 1992, Magistrate Baker issued an order granting Ms. Donnellan's motion to withdraw. (R. 1-27-1). He also granted Smith Barney's Motion to Compel, noting correctly that Ms. Meyer "personally in open Court stipulated that this matter is subject to binding arbitration." (R. 1-27-2). In his order, the Magistrate explicitly stated that "failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal." (R. 1-27-2). Despite Ms. Meyer's claim that she was "never sent, and never received" a copy of this order (Petition, p. 11), the order clearly indicates that the court sent a copy of the order *directly to Ms. Meyer*. (R. 1-27-2 to 3). On May 13, 1992, the United States District Judge, noting that no objections to the report and recommendation had been filed, issued an order adopting the report and recommendation and staying the action pending the parties' pursuit of relief by binding arbitration. (R. 1-29).

The preceding discussion clearly demonstrates that Ms. Meyer was not denied due process. The district court sent proper notice of the April 22 hearing to counsel of record, and it directed Ms. Meyer's attorney to provide copies of this notice to her clients. Ms. Meyer claims that her attorney did not provide her with notice of the hearing until April 17, 1992, five days before the hearing occurred. Assuming this is true, it simply is irrelevant to this case. The court sent proper notice of the hearing to counsel of record, and that is all that is required under the law.

Ms. Meyer's complaints are properly directed, if anywhere, at the conduct of her former attorney. There exists no contention that the district court did not provide Ms. Meyer's counsel of record with proper notice of the hearing; indeed, Ms. Meyer

candidly admits that all counsel of record received notice of the hearing. (Petition, p. 10). It is clear that Ms. Meyer's counsel not only received notice of the hearing, but she informed Ms. Meyer of the hearing, *which Ms. Meyer attended*. During this hearing, Ms. Meyer stipulated to arbitration in open court. Ms. Meyer then had ten days in which to file objections to the Order. She did not retain a new attorney during these ten days, even though she had opportunity to procure representation; nor did she file objections to the order. The order therefore was binding, and Ms. Meyer was in no way denied due process.[7]

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7. Ms. Meyer cites *Powell v. Alabama*, 287 U.S. 45 (1932), *Geders v. United States*, 425 U.S. 80 (1976), and *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980) for the proposition that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process. Ms. Meyer certainly was not denied this right. She had at least five calendar days in which to procure counsel before the April 22 hearing, and she had ten additional days to retain counsel before the deadline to submit objections to the Magistrate's report. Further, while she attended the hearing, she did not ask the court at that time to delay its proceedings until she could obtain new counsel.

This case also is distinguishable from *Williams v. Estelle*, 566 F. Supp. 1376 (S.D. Tex. 1983). There, the magistrate relieved the plaintiff's attorney of his duties and replaced him with another attorney who was completely unfamiliar with the plaintiff's case. *Id.* at 1379. The magistrate then provided the new attorney with only two and a half days to prepare for trial. *Id.* Moreover, the magistrate made numerous prejudicial comments in front of the jury during trial. *Id.* at 1378-80. The court therefore held that the magistrate unduly prejudiced the plaintiff's case. *Id.* at 1380.

In this case, the district court properly provided Ms. Meyer's attorney of record with notice of the April 22 hearing, and both Ms. Meyer and her attorney were present at the hearing. Although Ms. Meyer apparently disagrees with her attorney's management of her case, that is immaterial to this appeal. There simply is "no constitutional or statutory right to *effective* assistance of counsel" in civil cases. *Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1522 (11th Cir. 1983) (emphasis added). Thus, Ms. Meyer's allegations regarding the ineffectiveness of her attorney do not establish a due process violation.

Furthermore, assuming for the sake of argument that Ms. Meyer did not receive proper notice of the hearing which compelled arbitration, any due process violation was nonprejudicial because the district court was unquestionably compelled to hold that the arbitration agreement which Ms. Meyer executed is enforceable. As discussed in the following section, the law requiring the arbitration of this case is very clear. There was nothing that Ms. Meyer could have done to change that law regardless of how much notice she had of the hearing. Consequently, even if Ms. Meyer was denied due process, that was harmless error since this case would have been compelled to arbitration anyway.[8]

II.

THE ELEVENTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S SUBMISSION OF THIS CASE TO BINDING ARBITRATION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR THE NINTH CIRCUIT.

Ms. Meyer asserts that even though the arbitration agreement she signed is enforceable under the Federal Arbitration Act ("FAA"), that enforceability does not extend to claims brought under Title VII. This argument is directly contrary to established Supreme Court precedent and decisions of at least the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

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8. Ms. Meyer argues at length that she was harmed by her alleged failure to receive adequate notice because the district court rendered a decision contrary to her position. (Petition, pp. 7-11). She even goes so far as to allege "complicity" between her former attorney and Smith Barney's attorney. (Petition, p. 8). Ms. Meyer's unjustified attack is inappropriate and unsupported by the record. Moreover, as previously noted, any alleged lack of notice clearly was harmless because the law required the submission of Ms. Meyer's case to arbitration; no amount of additional notice could change the status of the law.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1650 (1991), this Court held that an ADEA claim was subject to compulsory arbitration pursuant to a securities industry arbitration agreement. The plaintiff in *Gilmer* signed the same arbitration clause which Ms. Meyer signed — a Form U-4. *Id.* The Court ruled that statutory claims, including ADEA claims, may be the subject of an arbitration agreement, enforceable pursuant to the FAA. *Id.* at 1657.[9]

In this case, Ms. Meyer executed the same arbitration clause as the securities dealer in *Gilmer*. Thus, her ADEA claims are directly controlled by *Gilmer* and are subject to mandatory arbitration. Additionally, while *Gilmer* did not specifically deal with parallel Title VII issues, the Eleventh Circuit unequivocally has held that Title VII claims are subject to compulsory arbitration. *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992). The facts in *Bender* are similar to the facts of this case. The plaintiff, a stockbroker, filed an action under Title VII alleging that she was sexually harassed by her supervisor. *Id.* She also raised pendent state tort claims. *Id.* Like Ms. Meyer, the plaintiff signed a U-4 registration form which included a mandatory arbitration agreement. *Id.* at 700. In her application for registration as a stockbroker with the NASD and the NYSE, the plaintiff agreed to arbitrate disputes with her employer. *Id.* at 699. The Eleventh Circuit held that *Gilmer* was dispositive of agreements to arbitrate Title VII claims. *Id.* at 700. Thus, based on *Gilmer*, the Eleventh Circuit concluded that the plaintiff could not pursue a sexual harassment claim under Title VII except under the NYSE's compulsory arbitration procedure. *Id.*

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9. Ms. Meyer argues that *Gilmer* should not be retroactively applied, and in support of this argument she notes that the Civil Rights Act of 1991 is not retroactive. (Petition, pp. 12-13). However, *Gilmer* did not address new statutory law; rather the Supreme Court interpreted existing law. Thus, the issue of retroactivity is not applicable to the judicial decision rendered in *Gilmer*.

Ms. Meyer cites *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995), in support of her argument that *Bender* conflicts with Ninth Circuit precedent. In *Prudential*, the Ninth Circuit held that there must be a knowing agreement to arbitrate before an employee waives Title VII claims. *Id.* at 1304. Ms. Meyer thus argues that she did not knowingly and voluntarily waive her right to trial on her Title VII claims. In fact, Ms. Meyer states that she was forced to sign the arbitration agreement under "duress." (Petition, p. 14).[10] However, Ms. Meyer is an experienced businessperson, and there exists no suggestion in the record that she was coerced or defrauded into agreeing to an arbitration clause. Thus, the arbitration agreement signed by Ms. Meyer is binding and enforceable, for the reasons set forth by the Supreme Court in *Gilmer*, 111 S. Ct. at 1655-56.

Furthermore, Ms. Meyer's assertion that *Bender* conflicts with Ninth Circuit precedent is patently incorrect. As noted in Respondent's appellate brief and in the *Prudential* decision itself, the Ninth Circuit has expressly held that Title VII claims are subject to compulsory arbitration under the FAA. *See Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). Thus, the Ninth Circuit is in accord with the decisions of the Eleventh Circuit and this Court.[11]

In summary, the facts of this case are substantially similar to

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10. In her Eleventh Circuit brief, Ms. Meyer stated that her signature was not voluntary simply because she was given "ten to fifteen pages of forms" which she did not carefully read before signing. (Appellant's Brief, p. 11).

11. The Fifth, Sixth, and Tenth Circuits also have concluded that Title VII claims are subject to compulsory arbitration under the FAA. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Metz v. Merrill Lynch*, 39 F.3d 1482 (10th Cir. 1994).

Gilmer and *Bender*. Ms. Meyer executed a Form U-4 and contractually agreed to arbitrate any controversy arising out of her employment as a Smith Barney financial consultant. Because Ms. Meyer's ADEA and Title VII claims fall squarely within the contractual language of her agreement, the agreement should be enforced under Supreme Court and Fifth, Sixth, Tenth, Eleventh *and* Ninth Circuit precedent. Thus, the district court correctly submitted this case to binding arbitration.

III.

THE *BENDER* DECISION AND THE FEDERAL ARBITRATION ACT DO NOT UNDERMINE SUPREME COURT PRECEDENT, NOR DO THEY DISTORT CIVIL RIGHTS LAW.

The third issue which Ms. Meyer presents on appeal is vague. However, Ms. Meyer appears to argue that submitting Title VII claims to binding arbitration conflicts with Supreme Court precedent. However, as discussed above, *Gilmer* explicitly held that discrimination claims are subject to compulsory arbitration pursuant to a securities industry arbitration agreement. The Fifth, Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal unanimously agree that *Gilmer* extends to Title VII suits. Thus, despite Ms. Meyer's allegations to the contrary, the *Bender*, *Alford*, *Willis*, *Metz*, and *Mago* decisions, *supra*, are in accord with Supreme Court precedent.

Ms. Meyer also appears to argue that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") conflicts with Supreme Court precedent and distorts civil rights law. Ms. Meyer is correct when she notes that the FAA substantially limits judicial review of arbitration awards. In fact, the FAA "presumes that arbitration awards will be confirmed" and enumerates only four narrow bases for vacatur. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994

F.2d 775, 778-79 (11th Cir. 1993). (*See* Appendix D for the grounds for vacatur). However, this Court has held that the FAA manifests "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). In fact, the primary congressional purpose underlying the FAA is "to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Thus, the Supreme Court has explicitly approved the FAA's policy of favoring the enforcement of arbitration agreements.

IV.

THE DISTRICT COURT PROPERLY REJECTED MS. MEYER'S ATTEMPT TO VACATE THE ARBITRATION AWARD.[12]

A. Ms. Meyer Failed to Establish that the Arbitration Award Was Procured By Fraud or Undue Means.

Ms. Meyer states that the district court erred in not vacating the arbitration award because it allegedly was procured by corruption, fraud, or undue means. This Court recently held that a district court's denial of a request to vacate an arbitration award is subject to *de novo* review. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995); *see also Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995).

While Ms. Meyer alleges that the arbitration award was procured through undue means and fraud, her assertions are not valid. She initially contends that the arbitration process was

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12. Ms. Meyer's argument regarding vacatur is set forth in her Supplement to Petition for a Writ of Certiorari. Smith Barney once again objects to Ms. Meyer's gross mischaracterization of facts and her failure to cite to the record.

compromised because of alleged misstatements of law and fact by Smith Barney's attorney during his closing argument. Specifically, Ms. Meyer asserts that Smith Barney's counsel misstated the law of sexual harassment, retaliation and the applicable law on damages under Title VII.[13]

Even if Ms. Meyer could prove that Smith Barney's counsel misrepresented a matter to the arbitrators, the arbitration result must be upheld. Ms. Meyer's assumes that a misstatement of law or fact by Smith Barney's counsel (which Smith Barney vigorously disputes occurred) would constitute undue influence. However, assuming that the law and/or facts were misstated, courts may not vacate an arbitration award "on the basis of errors of law or interpretation." *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988).

It also is important to note that Ms. Meyer and her counsel were present at the arbitration hearing and could have responded to the alleged misrepresentations at or near the time that they were made. Indeed, Ms. Meyer admits that her attorney responded to Smith Barney's characterization of sexual harassment and presented a quite different (albeit incorrect) analysis of the law. (R. 4-73-3 to 4). Thus, any alleged "undue influence" was discovered or discoverable during arbitration.

In reality, Ms. Meyer is trying to recharacterize as allegations of undue influence certain issues which she had the opportunity to address during arbitration. Arguably, she is

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13. Smith Barney denies that its counsel misstated the law or facts of this case. A review of the arbitration proceeding would demonstrate that Smith Barney's counsel correctly presented the law of sexual harassment, retaliation and limitations on damages to the arbitrators. However, Ms. Meyer has not presented this Court with a record or transcript from which the Court could possibly analyze or evaluate the arbitration proceedings below.

attempting to retry her case before this Court. That, of course, is inappropriate under the FAA. Further, there exists no actual evidence of undue influence. Consequently, in an effort to discredit Smith Barney, Ms. Meyer argues alternatively that the award should be vacated because one of Smith Barney's exhibits was fraudulent. Specifically, Ms. Meyer accuses Mr. Helmich, her former supervisor, of fabricating a document. That accusation is completely baseless.

Before an award may be vacated for fraud, it must be "abundantly clear" that the award was actually obtained through fraud. *Peabody v. Rotan Mosle, Inc.*, 677 F. Supp. 1135, 1137 (M.D. Fla. 1987). To meet this burden of proof, Ms. Meyer must establish: (1) the existence of fraud by clear and convincing evidence; (2) that the fraud was not discoverable upon the exercise of due diligence prior to or during the arbitration; and (3) that the fraud materially related to an issue in the arbitration, thus depriving the party of a fair hearing. *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). Ms. Meyer cannot meet any of these requirements.

First, and most importantly, Smith Barney committed no fraud. Mr. Helmich testified on direct examination that Smith Barney's Arbitration Exhibit # 12 was a tracking sheet of new accounts that he used to gauge the initial performance of financial consultants during the training period. (R. 4-76-8). After a few voir dire questions from Ms. Meyer's counsel, this exhibit was admitted into the arbitration proceeding *without objection*. (R. 4-76-8).

Almost eight months after Mr. Helmich's testimony, Ms. Meyer for the first time claimed that Mr. Helmich fabricated the tracking sheet. (R. 4-76-9). She disputes the accuracy of some of the entries, particularly during one week when she allegedly was in Chicago. (R. 4-76-9). Because she states that she was in

Chicago, she leaps to the conclusion that Mr. Helmich fabricated the document. (R. 4-76-9). Clearly, Ms. Meyer's allegation of fabrication of evidence is based solely on speculation.

Further, even if Mr. Helmich had fabricated the document (which Smith Barney adamantly denies), Ms. Meyer could have discovered this "fact" during the arbitration. However, since the document was not included in Smith Barney's list of exhibits supplied before the arbitration, Ms. Meyer argues that there was no way to discover the fraud prior to or during the arbitration. Ms. Meyer fails to mention that there was ample time to discover any alleged fraud during the 18-day period between Mr. Helmich's direct and cross examination.[14] Consequently, Ms. Meyer had more than sufficient opportunity to examine any discrepancies between her alleged tracking sheet and the exhibit in question. It is too late for her to raise that issue now.

Finally, even assuming the document was fraudulent, Ms. Meyer cannot establish that the fraud materially related to an issue in the arbitration, thus depriving her of a fair hearing. Ms. Meyer correctly states that her performance problems were material issues in the arbitration. However, the document in question pertaining to Ms. Meyer's initial sales productivity was only one of many examples of Ms. Meyer's performance problems. Moreover, Ms. Meyer has *never* disputed that she barely met the initial quota of opening 40 qualified accounts within six months, which is what the document in question was introduced to demonstrate. (Both sides agree that she only opened 41 accounts within that deadline). The tracking sheet in question therefore was not pivotal in this case, and Ms. Meyer

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14. Mr. Helmich's direct examination occurred on March 31, 1994. (R. 4-76-8 n. 7). Due to the unexpected length of Ms. Meyer's case, the arbitration had to be continued, and another session was scheduled for April 19, 1994. (R. 4-76-8 to 9 n. 7). Mr. Helmich's cross examination did not begin until that day and lasted for several hours. (R. 4-76-8 to 9 n. 7).

was afforded ample opportunity to cross examine Mr. Helmich on the issue to which it relates. *See O.R. Securities*, 857 F.2d at 749 (award not vacated when falsity of testimony was or should have been noticed during the arbitration proceedings and movant had the opportunity to crossexamine regarding the alleged false testimony); *Peabody*, 677 F. Supp. at 1137-38 (award not vacated where plaintiff's expert witness perjured his credentials; the issue to which the expert testified was "relatively minor" and defendants were able to cross examine the witness and present countervailing testimony if desired). As a result, Ms. Meyer's allegations of fraud do not provide grounds to vacate the award.

B. The District Court Correctly Held that the Arbitrators Properly Excluded Hearsay Evidence Offered by Ms. Meyer.

Ms. Meyer also objects to the arbitrators' exclusion of a three-ring notebook entitled "The Arrogance of Power: How Shearson's Uncontrolled, Arbitrary Power Led to the Wrongful Treatment of this Broker." (Supplement to Petition, pp. 7-9). The notebook consisted of Plaintiff's descriptive analysis (essentially written hearsay testimony) of the facts of her case, numerous newspaper and magazine articles, and various other inadmissible materials. (R. 2-58-3 n. 2). The arbitrators agreed that the notebook was irrelevant and inadmissible. (R. 2-58-3 n. 2).

The district court correctly held that the exclusion of the book does not mandate vacatur of the arbitration award. The arbitrators are the judges of the admissibility and relevancy of evidence. *Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985). Absent "exceptional circumstances," a reviewing court may not overturn an arbitration award based on the arbitrator's determination of the relevancy or persuasiveness of evidence. *Id.* at 39-40. In fact, vacatur of an arbitrator's award for refusing to hear evidence is appropriate *only* when the exclusion

of *relevant* evidence so affects the rights of a party that it deprives him or her of a fair hearing. *Id.* at 40. As noted above, Ms. Meyer's notebook was not only irrelevant, it did, in fact, consist of hearsay evidence. Thus, the arbitrators properly excluded the notebook from evidence.

CONCLUSION

The Eleventh Circuit's affirmance of the district court's November 4th Order and November 6th Order is not in conflict with that of other Circuits, nor do the issues at hand involve important questions of federal law that should be settled by this Court. While Ms. Meyer may be unrelenting in her efforts to state a case against Smith Barney, those efforts arise more from antagonism than from merit. The law is well-settled that this case should have been arbitrated. Further, that arbitration was fair in both process and result.

There exists no reason for this Court to second-guess either the propriety of the decision to arbitrate this case or the result that was reached in the arbitration. Consequently, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GAVIN S. APPLEBY
Counsel of Record
POWELL, GOLDSTEIN, FRAZER
& MURPHY
Attorneys for Respondent
Sixteenth Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-6600

APPENDIX A — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DATED APRIL 23, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 91-193-Civ-Orl-19

DIANNA D. MEYER, LINDA C. FRANK and HERMAN K. GOLNIK,

Plaintiffs,

-vs-

SHEARSON LEHMAN BROTHERS, INC.,

Defendant.

ORDER AND REPORT AND RECOMMENDATION

This cause came on for consideration with oral argument heard on April 22, 1992 on the following motions filed herein:

MOTION: **MOTION TO WITHDRAW AS COUNSEL FOR PLAINTIFFS DIANNA D. MEYER AND HERMAN K. GOLNIK, JR. AND FOR ENLARGEMENT OF TIME TO SUBMIT PRE-TRIAL STIPULATION (#25)**

FILED: April 10, 1992

Thereon it is **ORDERED** that the motion is **GRANTED.** Ms. Donnellan is relieved of further responsibility for

representation of Plaintiffs Dianna D. Meyer and Herman K. Golnik, Jr., both of whom will be proceeding *pro se*.

MOTION: DEFENDANT'S MOTION TO COMPEL ARBITRATION (#21)

FILED: April 9, 1992

Plaintiff Linda C. Frank, by counsel, and the other two Plaintiffs personally in open Court stipulated that this matter is subject to binding arbitration pursuant to agreements signed by the Plaintiffs. The United States Supreme Court has held that statutory claims such as these are subject to arbitration clauses. *Gilmer v. First Interstate/Johnson*, 111 S.Ct. 1647(1991).

Accordingly, the undersigned respectfully recommends that the motion be granted and that this case be stayed pending the parties' pursuit of relief by binding arbitration in accordance with their agreement.

As to the recommendation set forth above, failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

DONE and **ORDERED** in Orlando, Florida, this 23rd day of April, 1992.

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Appendix A

Copies furnished to:

Gavin S. Appleby, Esquire
Mahoney Adams & Criser, P.A.
3300 Barnett Center
50 N. Laura Street
Jacksonville, FL 32201

Nancy K. Donnellan, Esquire
De Manio & Young, P.A.
2901 South Tamiami Trail
Sarasota, FL 34239

Dianna D. Meyer
125 Primrose Drive
Longwood, FL 32779

Herman K. Golnik, Jr.
109 Oak Lane
Altamonte Springs, FL 32714

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA DATED MAY 13, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

CASE NO. 91-193-CIV-ORL-19

DIANA D. MEYER, et al.,

Plaintiffs,

v.

SHEARSON LEHMAN BROTHERS, INC. f/k/a Shearson Lehman Button, Inc.,

Defendant.

ORDER

This matter came before the Court on the Report and Recommendation of the United States Magistrate Judge (Doc. No. 27, filed April 23, 1992). No objections to the Report and Recommendation of the Magistrate Judge have been filed within the ten days from such Order.

Upon consideration, the Report and Recommendation of the Magistrate Judge is **ADOPTED**, and the cause is **STAYED** pending the parties' pursuit of relief by binding arbitration in according with their Arbitration Agreement.

The Plaintiff shall file a status report with this Court within ninety (90) days from the date of this Order, and every

ninety (90) days thereafter, advising the Court of the status of the arbitration proceedings and what, if any, further proceedings are necessary in this Court.

DONE AND ORDERED at Orlando, Florida this ___ day of May, 1992.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:

Dianna D. Meyer
125 Primrose Drive
Longwood, FL 32779

Herman K. Golnik, Jr.
109 Oak Lane
Altamonte Springs, FL 32714

Gavin S. Appleby, Esquire
Mahoney, Adams & Criser
P.O. Box 4099
Jacksonville, FL 32201

Nancy K. Donnellan, Esquire
Demanio & Young
2901 South Tamiami Trail
Sarasota, FL 34239

Elizabeth C. Black, Esquire
Steven T. Breaux, Esquire
Paul, Hastings, Janofsky & Walker

Appendix B

133 Peachtree Street
4200 Georgia-Pacific Center
Atlanta, GA 30303

APPENDIX C — U.S. CONST. AMEND. V

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D — 9 U.S.C. § 10(a)

9 U.S.C. § 10(a)

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

APPENDIX E — 28 U.S.C. § 1291

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.